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**OBLIGATION TO NEGOTIATE IN GOOD FAITH AND THE CONSEQUENCES OF  
A BREACH THEREOF IN INTERNATIONAL LAW**

Master's Thesis

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## INTRODUCTION

Negotiations between States are an integral aspect of international relations.<sup>1</sup> They are the most widely used and effective means for promoting bilateral and multilateral cooperation between States.<sup>2</sup> The process of negotiations is largely unregulated at the international level *strictu sensu*.<sup>3</sup> On the one hand, it is argued that good faith, as normatively recognised in Article 2(2) of the UN Charter,<sup>4</sup> is an underlying principle of international law<sup>5</sup> that applies, among other areas, to international negotiations. On the other hand, the International Court of Justice (ICJ) has noted that the principle of good faith relates ‘only to the fulfilment of existing obligations’.<sup>6</sup> However, negotiations are essentially a voluntary process – a right stemming from State sovereignty, not an existing obligation.<sup>7</sup>

Good faith applies to all international negotiations as a moral standard of behaviour.<sup>8</sup> It is natural that a measure of trust and good faith is present or developed between the negotiating parties;<sup>9</sup> however, whether therefrom arises a legal obligation a breach of which would be subject to sanctions, is the central question of this master thesis. The aim of the present master thesis is to analyse whether in international law States are under a legal obligation to negotiate in good faith, the source and essence of such obligation, and the legal consequences of a breach thereof. The sources of international law are listed in Article 38(1) of the Statute of the

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<sup>1</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, recitals 4 and 7; K. Wellens. *Negotiations in the Case Law of the International Court of Justice. A Functional Analysis*. Farnham: Ashgate 2014, p 23; M. A. Rogoff. *The Obligation to Negotiate in International Law: Rules and Realities*. – Michigan Journal of International Law 1994/16, p 182.

<sup>2</sup> UNGA Report of the Secretary General (3 September 1998) UN Doc A/53/332, comments by Kyrgyzstan and Mongolia.

<sup>3</sup> In a substantively legal normative sense. G. Korontzis. *Making the Treaty* in D. B. Hollis (Ed). *The Oxford Guide to Treaties*. New York: Oxford University Press 2012, p 179; T. Hassan. *Good Faith in Treaty Formation*. – Virginia Journal of International Law 1981/21(3), p 470. See also UNGA Report of the Secretary General (3 September 1998) UN Doc A/53/332, comments by Qatar.

<sup>4</sup> Charter of the United Nations and the Statute of the International Court of Justice. – RT II 1996, 24, 95. See also Hassan, pp 445-446.

<sup>5</sup> UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/25/2625; *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports 1998, p 275 (hereinafter *Cameroon v Nigeria Preliminary Objections*), para 38; M. N. Shaw. *International Law*. 6<sup>th</sup> ed. Cambridge: Cambridge University Press 2012, p 123.

<sup>6</sup> *Cameroon v Nigeria Preliminary Objections*, para 59. See also *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p 69 (hereinafter *Border and Transborder Armed Actions*), para 94; Shaw, p 104; Rogoff, p 155.

<sup>7</sup> Wellens, p 23.

<sup>8</sup> H. Kelsen and the drafters of the Harvard Draft Convention recognised the moral but not the legal effect of the principle of good faith. See H. Kelsen. *The Law of the United Nations: a Critical Analysis of Its Fundamental Problems: with Supplement*. Union (NJ): Lawbook Exchange 2008, p 89; Harvard Law School. *Draft Convention on the Law of Treaties (Part III; Law of Treaties)*. – American Journal of International Law, Supplement 1935/29 (hereinafter the Harvard Draft Convention), pp 780-781 as referred to in Hassan, pp 445-446, 465.

<sup>9</sup> U. Lindell. *Modern Multilateral Negotiation: The Consensus Rule and Its Implications in International Conferences*. Lund: Studentlitteratur 1988, p 80.

International Court of Justice (hereinafter the ICJ Statute): international conventions, customary international law, general principles of law recognised by civilised nations, and, as subsidiary means, judicial decisions, and academic teachings.

To provide an answer to the research question, it is necessary to answer the following sub-questions: whether and to what extent is there an obligation to negotiate in good faith in international treaty law; whether and to what extent is there an obligation to negotiate in good faith in customary international law; whether the obligation to negotiate in good faith is a general principle of law common to domestic legal systems; is the obligation to negotiate in good faith applicable to all negotiations between States; how is the obligation to negotiate in good faith substantiated; and what consequences derive from the breach of this obligation.

The author raises the main hypothesis that in international law States are under a legal obligation to negotiate in good faith and its breach is subject to legal sanctions. Five sub-hypotheses are drawn that help to test the main hypothesis. First, in international treaty law the obligation to negotiate in good faith is recognised only to a limited extent. Second, the obligation to negotiate in good faith has become a rule of customary international law. Third, it is not a general principle of law common to domestic legal systems. Fourth, the customary international law principle of good faith negotiations applies to all negotiations between States. Fifth, the breach of the obligation to negotiate in good faith entails legal consequences under the VCLT and the law of State responsibility.

The obligation to negotiate in good faith is of timeless relevance as negotiations are an everyday part of international relations. Good faith is a prerequisite for successful negotiations – it enhances the predictability of negotiating parties by reducing uncertainty and promoting an atmosphere of trust at negotiations.<sup>10</sup> However, good faith is a vague notion which is difficult to define. A lack of clear legal rules concerning the conduct of negotiations provides too much room for different interpretations.<sup>11</sup> Thus, an analysis of the essence of the obligation to negotiate in good faith would provide legal clarity for States regarding their rights and obligations when conducting or breaking off negotiations. Safeguarding one's interests and improving the bargaining position is especially important for smaller States, such as Estonia, in negotiations at both the bilateral and multilateral levels.<sup>12</sup>

On the one hand, States should not be afraid to invoke their rights corresponding to a breach of the obligation to negotiate in good faith. On the other hand, a clearly stated rule which is

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<sup>10</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, recital 8.

<sup>11</sup> UNGA Report of the Secretary General (3 September 1998) UN Doc A/53/332, comments by Mongolia.

<sup>12</sup> *Ibid*, comments by Libyan Arab Jamahiriya.

applied consistently will exert a pull toward compliance.<sup>13</sup> It serves to ensure the stability of international relations and the well-being of the community by aiming to avoid incalculable harm. Thus, the obligation to negotiate in good faith is of particular relevance in matters of urgency, such as peace negotiations.

The obligation to negotiate in good faith is of particular relevance today as the issues being negotiated have become increasingly complex and intertwined with issues in other negotiations. The conduct during and result of negotiations might have important implications to the negotiating States' relations and negotiations with other States. Increasingly, negotiations take place between States and international organisations, where the latter enjoy an inherently stronger bargaining position. While the master thesis is concerned with negotiations between States, the obligation to negotiate in good faith should be seen as applicable to negotiations between States and international organisations or between international organisations.

The issue of good faith negotiations is not merely theoretical; it has also been on the agenda of international courts. At the moment, a case is pending in the Permanent Court of Arbitration (PCA) where Timor-Leste is seeking to invalidate a treaty with Australia on the grounds of fraud.<sup>14</sup> As another example, the Marshall Islands have brought claims against the United Kingdom, India and Pakistan, alleging that they have breached their duty to undertake good faith negotiations on effective measures on cessation of the nuclear arms race and on a treaty on nuclear disarmament in accordance with Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons<sup>15</sup> (NPT).<sup>16</sup>

For the purposes of the master thesis, the author has worked through and qualitatively analysed both international and domestic law, case law and academic literature in English in order to provide a systematic overview of the current state of international law with regard to the obligation to negotiate in good faith and the consequences of its breach. By way of both

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<sup>13</sup> Rogoff, p 173.

<sup>14</sup> Permanent Court of Arbitration. Arbitration under the Timor Sea Treaty (Timor-Leste v Australia). – <http://www.pcacases.com/web/view/37> (11 April 2016); K. Mitchell and D. Akande. Espionage & Good Faith in Treaty Negotiations: East Timor v Australia (20 January 2014). – <http://www.ejiltalk.org/espionage-fraud-good-faith-in-treaty-negotiations-east-timor-v-australia-in-the-permanent-court-of-arbitration/> (11 April 2016).

<sup>15</sup> Treaty on the Non-proliferation of Nuclear Weapons. – RT II 1999, 10, 64.

<sup>16</sup> Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland by the Republic of the Marshall Islands to the International Court of Justice (24 April 2014). – <http://www.icj-cij.org/docket/files/160/18296.pdf> (1 May 2016); Application instituting proceedings against the Republic of India by the Republic of the Marshall Islands to the International Court of Justice (24 April 2014). – <http://www.icj-cij.org/docket/files/158/18292.pdf> (1 May 2016); Application instituting proceedings against the Islamic Republic of Pakistan by the Republic of the Marshall Islands to the International Court of Justice (24 April 2014). – <http://www.icj-cij.org/docket/files/159/18294.pdf> (1 May 2016).

analysis and synthesis of the sources, the author has made inferences in order to answer the posed research question and sub-questions. The author has made use of the comparative method in ascertaining whether the obligation to negotiate in good faith could be a general principle of law recognised by civilised nations (ICJ Statute Article 38(1)(c)).

As recognition by all domestic legal systems is not required under Article 38(1)(c) of the ICJ Statute, the comparative analysis is not exhaustive but is based on a comparison of the representative domestic legal systems of the largest and most influential legal traditions – the civil law tradition and the common law tradition.<sup>17</sup> The sample representative States are chosen based on K. Zweigert and H. Kötz's macro level comparative law division of legal families,<sup>18</sup> and include Germany, France, and the Netherlands in the civil law tradition, and England, the USA, Australia, and Canada in the common law tradition. The comparison is limited to private law – mostly contract law and tort law, under which the issues of pre-contractual liability are most often dealt with. The comparative analysis has a heavier focus on the common law legal tradition as the issue is more controversial there. Since the author of the master thesis is from a civil law background and has only little prior personal acquaintance with common law, she has relied on secondary literature in that regard. In addition, the author has had to rely on English secondary literature regarding German, French and Dutch case law.

Based on the above, the master thesis is composed of three parts. The first chapter provides an overview and analysis of the obligation to negotiate in good faith in international law. Section 1.1 provides an overview of the general international law principle of good faith. Section 1.2 analyses treaty law and customary international law regarding the obligation to negotiate in good faith. Section 1.3 analyses the applicability of the obligation to negotiate in good faith to all negotiations, i.e. lacking an express conventional or general international law obligation to negotiate. The second chapter of the master thesis undertakes a comparative analysis of pre-contractual liability in domestic legal systems in order to establish whether the obligation to negotiate in good faith derives from domestic legal systems as a general principle of law recognised by civilised nations. Section 2.1 describes the nature and method of derivation of general principles of law. Section 2.2 provides a brief overview of instruments which seem to support the existence of a generally recognised obligation to negotiate in good faith. Sections 2.3 and 2.4 discuss the approaches to the principle of good faith and obligation to negotiate in

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<sup>17</sup> J. H. Merryman and R. Pérez-Perdomo. Two Legal Traditions in J. H. Merryman and R. Pérez-Perdomo. *The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America*. 3<sup>rd</sup> ed. Stanford: Stanford University Press 2007, pp 1-5.

<sup>18</sup> K. Zweigert and H. Kötz. *An Introduction to Comparative Law*. 3rd ed. Oxford: Clarendon Press 1998, p 73.

good faith in the civil law and common law legal traditions, respectively. Section 2.5 provides a conclusion and implications of the comparative analysis. In the third chapter of the master thesis, the legal consequences of a breach of the obligation to negotiate in good faith are outlined. Section 3.1 deals with consequences deriving from the Vienna Convention on the Law of Treaties (VCLT)<sup>19</sup> and Section 3.2 with consequences under the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>20</sup> Section 3.3 exemplifies the consequences of a breach of the obligation to negotiate in good faith in Article VI of the NPT.

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**Keywords:** public international law, international negotiations, good faith, comparative law, State responsibility.

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<sup>19</sup> Vienna Convention on the Law of Treaties. – RT II 2007, 15.

<sup>20</sup> UNGA Res 56/83, Responsibility of States for Internationally Wrongful Acts (28 January 2002) UN Doc A/RES/56/83 (hereinafter ARSIWA).



# 1 OBLIGATION TO NEGOTIATE IN GOOD FAITH IN INTERNATIONAL LAW

Negotiations are an integral aspect of international relations in the creation of new international norms of conduct of States and in the peaceful settlement of disputes.<sup>21</sup> Essentially, negotiations are a voluntary process,<sup>22</sup> but in certain circumstances the duty to negotiate has a general international law or a conventional basis.<sup>23</sup> The process of negotiations is largely unregulated at the international level.<sup>24</sup> The present master thesis aims to establish whether and to what extent there is a general obligation to negotiate treaties in good faith.

For the purposes of the present master thesis, ‘negotiations’ are defined as a ‘process in which explicit communication is exchanged in an attempt to reach agreement on the realization of a common goal’, including the drafting of the treaty.<sup>25</sup> In order to have as all-embracing definition as possible, the definition dispenses with the requirement of the presence of conflicting interests,<sup>26</sup> although these are often, but not necessarily, inherent in the negotiations. The result of successful negotiations is a ‘treaty’, which is defined as an international agreement governed by international law and concluded in written form between States, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>27</sup>

This chapter of the master thesis gives an overview of the general principle of good faith in international law (section 1.1) followed by an analysis of treaty and customary law regarding the obligation to negotiate in good faith and the interpretation of the obligation in the practice of the international judiciary (section 1.2). Section 1.3 provides an analysis of the applicability of the principle of good faith to all international negotiations.

## 1.1 The Principle of Good Faith in International Law

The principle of good faith is an underlying principle of international law.<sup>28</sup> However, it is vague, difficult to define, and its application largely depends on the prevailing

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<sup>21</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, recitals 4 and 7; Wellens, p 23; Rogoff, p 182.

<sup>22</sup> Wellens, p 23.

<sup>23</sup> Wellens, pp 23-26.

<sup>24</sup> Korontzis in Hollis, p 179; Hassan, p 470.

<sup>25</sup> Lindell, p 21. See also Rogoff, p 147.

<sup>26</sup> *Ibid.*

<sup>27</sup> VCLT Article 2(1)(a).

<sup>28</sup> *Cameroon v Nigeria*, para 38; Shaw, p 123.

circumstances.<sup>29</sup> An overview of the scope and applicability of the principle of good faith in international law is warranted to understand whether and to what extent it informs the obligation to negotiate in good faith.

J. F. O'Connor has undertaken the difficult task and provides a definition of the principle of good faith in international law:

The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the competing standards of honesty, fairness and reasonableness prevailing in the international community at that time.<sup>30</sup>

G. S. Goodwin-Gill provides a non-exhaustive list of different contexts where the principle of good faith operates:

- 1) to settle disputes in good faith;
- 2) to negotiate in good faith;
- 3) having signed a treaty, not to frustrate the achievement of its object and purpose prior to ratification;
- 4) having ratified a treaty, to apply and perform it in good faith;
- 5) to interpret treaties in good faith;
- 6) to fulfil in good faith any obligations arising from other sources of international law;
- 7) to exercise rights in good faith.<sup>31</sup>

The scope of the principle of good faith can be further clarified by reference to its sub-principles or concretisations, such as protection of legitimate expectations, estoppel, acquiescence, equity, and the prohibition of abuse of rights and discretion.<sup>32</sup> They mostly reinforce the duty to perform obligations arising from international law in good faith but may have wider implications.

In the following subsections the applicability of the principle of good faith to the performance of international obligations and in the context of dispute settlement is discussed.

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<sup>29</sup> Shaw, p 123.

<sup>30</sup> J. F. O'Connor. *Good Faith in International Law*. Aldershot: Dartmouth 1991, pp 124, 37-42.

<sup>31</sup> G. S. Goodwin-Gill. *State Responsibility and the 'Good Faith' Obligation in International Law* in M. Fitzmaurice and D. Sarooshi (Eds). *Issues of State Responsibility Before International Judicial Institutions*. The Clifford Chance Lectures. Vol 7. Oxford and Portland Oregon: Hart Publishing 2004, p 88 (footnotes omitted).

<sup>32</sup> O'Connor, pp 37-42; A. R. Ziegler and J. Baumgartner, *Good Faith as a General Principle of (International) Law* in A. D. Mitchell, M. Sornarajah, and T. Voon (Eds). *Good Faith and International Economic Law*. Oxford Scholarship Online 2015, p 12; S. Reinhold. *Good Faith in International Law*. – UCL Journal of Law and Jurisprudence 2013/40(2), p 47.

### 1.1.1 Obligation of Good Faith Performance of International Obligations

The principle of good faith is enshrined in Article 2(2) of the UN Charter and elaborated upon in the UNGA Resolution 25/2625 entitled ‘Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States’ (hereinafter the Friendly Relations Declaration). Both refer to the principle of good faith in the context of fulfilling obligations resulting from international law, namely, the UN Charter and international law generally, including treaties, respectively. Similarly, Article 26 of the VCLT, enshrining the general principle of *pacta sunt servanda*, provides that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.’ The third recital of the preamble of the VCLT provides that ‘the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.’

For the purposes of the master thesis, the *pacta sunt servanda* rule is of importance where States have undertaken an obligation to negotiate in good faith by virtue of an express treaty provision (see also subsection 1.2.2). *Pacta sunt servanda* rule means that ‘states cannot unilaterally modify, or free themselves from, the terms of a treaty as long as it is in force’.<sup>33</sup> The duty to perform a treaty in good faith involves the good faith interpretation of the respective treaty obligations.<sup>34</sup> The ICJ has emphasised in the *Gabčíkovo-Nagymaros Project* case that a treaty needs to be applied in a reasonable way and good faith treaty performance implies that the purpose of the treaty and the parties’ intentions prevail over its literal application.<sup>35</sup> The duty to perform a treaty in good faith also includes the duty not to defeat the object and purpose of the treaty, an idea also reflected but having a more limited effect in Article 18 of the VCLT.<sup>36</sup> It also encompasses a duty to settle disputes concerning treaty interpretation peacefully and to exercise rights arising from the treaty in good faith.<sup>37</sup>

Article 62 of the VCLT on the fundamental change of circumstances and the procedure to be followed with respect to invocation of invalidity, termination, withdrawal from or suspension of the operation of a treaty in Articles 65-67 of the VCLT also implies an obligation of good

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<sup>33</sup> Ziegler and Baumgartner in Mitchell et al., p 18.

<sup>34</sup> K. Schmalenbach in O. Dörr and K. Schmalenbach (Eds). Vienna Convention on the Law of Treaties. A Commentary. Heidelberg: Springer 2012, VCLT Article 26/46.

<sup>35</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ Reports 1997, p 7 (hereinafter *Gabčíkovo-Nagymaros Project*), para 142. See also Schmalenbach in Dörr, VCLT Article 26/46.

<sup>36</sup> Schmalenbach in Dörr, VCLT Article 26/49-50; Ziegler and Baumgartner in Mitchell et al., p 18. In SR Waldock’s third report the Article on *pacta sunt servanda* included a provision stating that ‘[g]ood faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.’ See Schmalenbach in Dörr and Schmalenbach, VCLT Article 26/6. Regarding Article 18 of the VCLT, see subsection 1.2.1.2.

<sup>37</sup> Ziegler and Baumgartner in Mitchell et al., p 11.

faith.<sup>38</sup> Namely, the invoking State must provide other parties with a written, reasoned notification of its claim (invalidity, suspension, termination), and in case of objections resort to peaceful dispute settlement means as indicated in Article 33 of the UN Charter (VCLT Articles 65(1), (3), and 67(1)).

The requirement of good faith performance also applies to obligations resulting from international law generally. R. Kolb argues that the principle of protection of all legitimate expectations has been induced from the principle of *pacta sunt servanda* to protect legitimate interests provoked in another person through a certain course of conduct and is necessary in order to ensure mutual trust, legal certainty, and stability of international relations.<sup>39</sup> Its further forms are the principles of estoppel and acquiescence,<sup>40</sup> which are often difficult to distinguish from each other.<sup>41</sup>

### ***Estoppel***

Estoppel in international law is a substantive rule founded on the principles of good faith and consistency that ought to prevail throughout international relations.<sup>42</sup> The principle of estoppel prohibits a party to adopt a legal position conflicting its own previous conduct or representations when another party has relied on such conduct or representations to its detriment or to the benefit of the former party.<sup>43</sup> It has its origins in common law estoppel;<sup>44</sup> however, estoppel in international law is not limited to procedural issues<sup>45</sup> and is less

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<sup>38</sup> See also O'Connor, pp 108-112.

<sup>39</sup> *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports 1974, p 253 and *Nuclear Tests (New Zealand v France)*, Judgment, ICJ Reports 1974, p 477 (hereinafter *Nuclear Tests*), para 49; R. Kolb, Principles as Sources of International Law (with Special Reference to Good Faith). – Netherlands International Law Review 2006/53, pp 10, 13; Ziegler and Baumgartner in Mitchell et al., p 17.

<sup>40</sup> Kolb, p 8; Ziegler and Baumgartner in Mitchell et al., p 17. For more detail see H. Thirlway, The Law and Procedure of the International Court of Justice. Fifty Years of Jurisprudence. Vol 1 and Vol 2. Oxford: Oxford University Press 2013, pp 27-43.

<sup>41</sup> N. S. M. Antunes, Acquiescence. – Max Planck Encyclopaedia of Public International Law 2006, para 24.

<sup>42</sup> A. Aust, Modern Treaty Law and Practice. 2<sup>nd</sup> ed. Cambridge: Cambridge University Press 2007, p 54; I. Brownlie, Principles of public international law. 6th ed. Oxford: Oxford University Press 2008, pp 420-421.

<sup>43</sup> Aust, pp 54-55; Shaw, p 102; Brownlie, pp 420-422; Reinhold, p 54; Ziegler and Baumgartner in Mitchell et al., p 20; *Nigeria Preliminary Objections*, para 57; *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment, ICJ Reports 1962, p 6 (hereinafter *Temple case*), Dissenting Opinion of Sir Percy Spender, pp 143-144.

<sup>44</sup> In common law, estoppel takes several forms, eg proprietary and promissory estoppel (see also subsection 2.4.5 below). International law has not recognised promissory estoppel yet, although the binding effect of unilateral acts can be explained on this. See T. Cottier and J. P. Müller, Estoppel. – Max Planck Encyclopaedia of Public International Law 2007, para 5.

<sup>45</sup> Procedurally, estoppel (by representation) operates as a rule of evidence, prohibiting a party to litigation to act in contradiction with its claims in the litigation. Estoppel may prevent the assertion of a particular fact in court, or exercising a certain right, or from bringing a particular claim in contradiction with a former representation. See *Argentina-Chile Frontier Case, Argentina v Chile*, Award, (1969) XVI RIAA 109, p 164.

technical than estoppel in municipal law.<sup>46</sup> Therefore, its incidence and effects in international law are not uniform.<sup>47</sup> On the one hand, it can operate as a principle of equity and justice in judicial reasoning, and on the other hand, as a restrictive concept it can operate independently.<sup>48</sup>

Analogically to principles of municipal law, the requirements of estoppel are ‘(a) an unambiguous statement of fact; (b) which is voluntary, unconditional, and authorized; and (c) which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement.’<sup>49</sup> It is suggested that the restrictive concept, which is prevalent, is not a universally adopted general principle of law but rather based upon a ‘combination of general principles of law, precedent, and doctrine, resulting in a norm of customary international law.’<sup>50</sup> The typical effect of estoppel is precluding the representing party from adopting the conflicting position.<sup>51</sup> Thus, where States are under an obligation to negotiate, estoppel could prohibit making conflicting representations during negotiations or even to break off negotiations in bad faith.

### *Acquiescence*

The second form of the principle of the protection of legitimate interests – acquiescence – aims to protect the existing state of affairs and requires that the facts and claims are well known, tolerated generally by the international community and for a long time by the State(s) whose interests are specifically affected.<sup>52</sup> Distinct from estoppel, acquiescence is not subject to the requirement of detrimental reliance.<sup>53</sup> Consent by acquiescence denotes a State’s tacit and unilateral consent through inaction or silence in circumstances where the passive State should have protested.<sup>54</sup> As a result, rights and obligations may be created, modified, disposed of, or terminated.<sup>55</sup> The obligations thus consented to must be performed in good faith.

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<sup>46</sup> Aust, p 54; Cottier and Müller, para 4. The several forms of estoppels in common law have different elements and applications. As an example, proprietary and promissory estoppel in common law aim to prevent injustice by giving effects to promises which are not contractually binding and enforceable for want of consideration. See also subsection 2.4.5 below.

<sup>47</sup> Brownlie, p 421.

<sup>48</sup> *Ibid*, p 421.

<sup>49</sup> *Ibid*, p 420.

<sup>50</sup> Cottier and Müller, para 10.

<sup>51</sup> *Ibid*, para 1.

<sup>52</sup> Brownlie, p 419.

<sup>53</sup> *Ibid*, p 422; Antunes, para 24; Cottier and Müller, para 6. See e.g. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* (Merits) ICJ Reports 1984, p 246 (hereinafter *Gulf of Maine*), paras 142-145.

<sup>54</sup> *Gulf of Maine*, para 130; Shaw, p 89; Antunes, para 2; Ziegler and Baumgartner in Mitchell et al., pp 23-24; Reinhold, pp 54-55. Acquiescence has its origins in the common law as a substantive concept and French procedural law as a procedural concept. See Brownlie, p 419; Antunes, para 3.

<sup>55</sup> Antunes, para 1.

Therefore, as a result of acquiescence a State might become bound by a duty to negotiate but the principle does not regulate States' conduct during the performance of the obligation.

### ***Abuse of Rights***

The duty of good faith performance is not only concerned with obligations but also with the exercise of rights arising from a treaty or under general international law. The prohibition of the abuse of rights doctrine helps to balance conflicting rights and interests in international law.<sup>56</sup> No theory of abuse of rights in the international sphere has been affirmed in the ICJ's jurisprudence but this may be a matter of terminology resulting from the use of the 'good faith' language instead.<sup>57</sup> Based on some *dicta* by individual judges, G. Fitzmaurice has formulated the doctrine of abuse of rights based upon a duty to exercise rights in good faith:

The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have *bona fide* reasons for what it does and not act arbitrarily or capriciously.<sup>58</sup>

Firstly, the doctrine prohibits malicious, arbitrary, or fictitious exercise of one's rights.<sup>59</sup> Secondly, it requires exercising rights reasonably and in good faith where others' rights might be negatively affected.<sup>60</sup> Thirdly, it prohibits abuse of discretion, i.e. requires discretion to be 'exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others'.<sup>61</sup> Fourthly, it prohibits abuse of procedural instruments and rights.<sup>62</sup> Knowingly abusing one's rights amounts to bad faith.<sup>63</sup> The doctrine of the abuse of rights implies that where a State exercises its sovereign right to enter into negotiations, it must do so with a sincere intent to reach agreement and not for some ulterior motives. In addition, it must also exercise in good faith its right not to conclude an agreement, i.e. not withdraw from negotiations arbitrarily. Internationally, however, good faith is presumed, and it might be difficult to rebut this presumption.<sup>64</sup>

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<sup>56</sup> Ziegler and Baumgartner in Mitchell et al., p 31; Reinhold, pp 49-51.

<sup>57</sup> Thirlway, p 22.

<sup>58</sup> G. Fitzmaurice. *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law*. – British Yearbook of International Law 1950/27, pp 12-13.

<sup>59</sup> Ziegler and Baumgartner in Mitchell et al., p 31.

<sup>60</sup> *Ibid*, p 32.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid*, pp 32-33.

<sup>63</sup> G. White. *The Principle of Good Faith in V. Lowe and C. Warbrick (Eds). The United Nations and the Principles of International Law — Essays in Memory of M. Akehurst*. London/NY: Routledge 1994, p 244.

<sup>64</sup> E.g. *Tacna-Arica question, Chile v Peru*, (1925) II RIAA 921 (hereinafter *Tacna-Arica question*), pp 929-930; *Lake Lanoux Arbitration, Spain v France*, (1957) XII RIAA 281 (hereinafter *Lake Lanoux*), para 9. See also Hassan, p 450; White in Lowe and Warbrick, pp 244, 246.

## Equity

The duty to perform obligations in good faith is further reinforced by equity. Equity in international law is not itself a source of law but refers to principles, such as fairness and reasonableness in the administration of justice, constituting the values of the system necessary to give meaning to abstract legal norms (equity *infra legem*) or fill gaps of international law (equity *praeter legem*).<sup>65</sup> It is to be distinguished from taking a decision *ex aequo et bono*, i.e. outside the law.<sup>66</sup> Equitable principles might also be used in derogation of the law (equity *contra legem*), however, in this case it is difficult to distinguish them from both equity *praeter legem* and decisions *ex aequo et bono*.<sup>67</sup> Sometimes the concretisations of the principle of good faith, such as *pacta sunt servanda*, prohibition of abuse of rights, and *rebus sic stantibus* (fundamental change of circumstances) are considered equitable principles.<sup>68</sup> Thus, while equity cannot be the source of the obligation to negotiate in good faith, equitable principles may help the court to assess whether the parties have breached it.

### 1.1.2 Peaceful Settlement of Disputes

The obligation to settle disputes peacefully deserves separate attention. Peaceful settlement of disputes that are likely to endanger international peace and security is required by Articles 2(3) and 33 of the UN Charter. The ICJ has held that obligations under Article 33 of the UN Charter are mutual and imperative.<sup>69</sup> The obligation concerns rather the peaceful mode of settlement as opposed to the use of force once settlement is sought. Obligation to negotiate disputes that endanger international peace and security is derived from the general and customary international law principles of duty of co-operation<sup>70</sup> and of peaceful settlement of disputes,<sup>71</sup> which is complementary to the prohibition of the use of force.<sup>72</sup>

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<sup>65</sup> Shaw, p 106; Brownlie, p 44; Ziegler and Baumgartner in Mitchell et al., pp 26-27. For more detail see Thirlway, pp 44-55.

<sup>66</sup> Ziegler and Baumgartner in Mitchell et al., p 27; Thirlway, pp 44-45; *North Sea Continental Shelf (Merits)* ICJ Reports 1964, p 3 (hereinafter *North Sea Continental Shelf cases*), para 88.

<sup>67</sup> Ziegler and Baumgartner in Mitchell et al., p 28.

<sup>68</sup> *Ibid*, p 27.

<sup>69</sup> Wellens, p 32; *Aegean Sea Continental Shelf*, Interim Protection Order of 11 September 1976, ICJ Reports, p 3, paras 35 and 41.

<sup>70</sup> A. Peters. International Dispute Settlement: A Network of Cooperational Duties. – European Journal of International Law 2003/14, pp 2, 9, 11, 29; C. Hutchison. The Duty to Negotiate International Environmental Disputes in Good Faith. – McGill International Journal of Sustainable Development Law and Policy 2006/2(2), pp 120, 141.

<sup>71</sup> Wellens, p 33; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010 (I), p 67 (hereinafter *Pulp Mills*), Separate opinion by Judge Cancado Trindade, paras 25, 178; A. Cassese. International Law. 2<sup>nd</sup> ed. Oxford: Oxford University Press 2005, p 283.

<sup>72</sup> *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, ICJ. Reports 1986, p 14 (hereinafter *Nicaragua*), para 291.

The Friendly Relations Declaration encourages States to seek ‘early and just settlement [of all] of their international disputes’ by means referred to in Article 33 of the UN Charter.<sup>73</sup> However, settlement by formal and legal procedures is consensual in character and, thus, there is no obligation in general international law, i.e. lacking a special treaty provision or a Security Council resolution to that regard, to settle all kind of disputes.<sup>74</sup> As examples, according to Article 65(3) of the VCLT a dispute concerning the validity of a treaty is to be settled through the means indicated in Article 33 of the UN Charter; Article 283(1) of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>75</sup> requires States to ‘proceed expeditiously to an exchange of views regarding [the dispute’s] settlement by negotiation or other peaceful means.’ Nevertheless, once States have resorted to peaceful settlement of disputes, Article 2(2) and (3) of the UN Charter require that the process of settlement is conducted in good faith.

One of the methods for the peaceful settlement of disputes listed in Article 33 of the UN Charter is negotiations. Negotiations in the dispute settlement context refer to communications, without third-party involvement, aiming for a consensual resolution to a dispute.<sup>76</sup> As any other treaty, such resolution is legitimised by State consent, bearing in mind that some power disparities are inevitable.<sup>77</sup> The international judiciary has given meaning to the obligation to negotiate in good faith where an obligation to negotiate has a general international law or conventional basis and in the dispute settlement context.<sup>78</sup>

The gap-filling function of general principles of international law, such as good faith, results in their applicability as guides in a decision-making process only where treaty or customary law based concretisations are lacking.<sup>79</sup> The Permanent Court of International Justice (PCIJ) and the ICJ have confirmed that from the principle of *pacta sunt servanda* stems an obligation to negotiate in good faith. However, the ICJ has also noted that the principle of good faith relates ‘only to the fulfilment of existing obligations’.<sup>80</sup> Hence, the principle of good faith does not by itself obligate a State to enter into negotiations.<sup>81</sup> The next sections aim to analyse

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<sup>73</sup> See also UNGA Res 37/10, Peaceful Settlement of Disputes between States (15 November 1982) UN Doc A/RES/37/10, para 5.

<sup>74</sup> Brownlie, p 718.

<sup>75</sup> United Nations Convention on the Law of the Sea. – RT II 2005, 16, 48.

<sup>76</sup> Peters, pp 4-5.

<sup>77</sup> *Ibid*, p 5.

<sup>78</sup> See subsection 1.2.2 below. E.g. *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, ICJ Reports 2011, p 644 (hereinafter *Interim Accord*), para 132.

<sup>79</sup> Ziegler and Baumgartner in Mitchell et al., p 10, Reinhold, p 41.

<sup>80</sup> *Cameroon v Nigeria Preliminary Objections*, para 59; *Border and Transborder Armed Actions*, para 94; Shaw, p 104; Rogoff, p 155.

<sup>81</sup> Rogoff, p 155; Wellens, p 42.



to what extent are treaty negotiations regulated under treaty law and customary international law that – as opposed to the general principles of international law – are not subsidiary means.<sup>82</sup>

## **1.2 Obligation to Negotiate in Good Faith in International Treaty and Customary Law**

This section analyses whether and to what extent are international negotiations regulated under the VCLT – the main source of reference for the conclusion of treaties (subsection 1.2.1). It further brings examples of *pactum de negotiando*, i.e. agreements to negotiate, and discusses how, based on these, the international judiciary has given substance to the obligation to negotiate in good faith (subsection 1.2.2). Finally, the possible customary law status of the duties of good faith during negotiations is assessed (subsection 1.2.3).

### **1.2.1 Good Faith in the Vienna Convention on the Law of Treaties**

The principle of good faith is expressly referred to in Articles 26 and 31 of the VCLT, which concern good faith performance and interpretation of treaties, respectively.<sup>83</sup> However, the obligation to negotiate in good faith, which is of interest to the present master thesis, concerns the behaviour of States during the process of drawing up and adoption of the text of the treaty, i.e. during the ‘pre-contractual’ negotiation period, which according to G. Korontzis has ‘not really been made the object of any international regulation *strictu sensu*.’<sup>84</sup>

The VCLT, which defines negotiations as the drafting and adoption process of a treaty,<sup>85</sup> does not include an express obligation to negotiate treaties in good faith. Thus, of importance for the present analysis are articles of the VCLT regulating States’ behaviour before a treaty’s entry into force. For the adoption of treaties, the requirement of consent is of utmost importance and, accordingly, grounds for invalidating consent, such as fraud, corruption, coercion, and illegal use of force, representing examples of bad faith conduct during treaty negotiations will be discussed.<sup>86</sup> In addition, Article 18 of the VCLT imposing the obligation to refrain from acts defeating the object and purpose of a treaty prior to its entry into force, and especially its negotiating history, provide useful insights for the purposes of the present master thesis.

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<sup>82</sup> Brownlie, p 34.

<sup>83</sup> See section 1.1.1 above.

<sup>84</sup> Korontzis in Hollis, p 179. See also Hassan, p 470.

<sup>85</sup> See the definition of a negotiating State in VCLT Art 2(1)(e).

<sup>86</sup> See also Goodwin-Gill in Fitzmaurice and Sarooshi, p 88, note 60; Hassan, p 470.

### 1.2.1.1 The Requirement of Consent and Grounds for Its Invalidity

Recital 3 of the preamble of the VCLT emphasises the universal recognition of the principles of free consent, good faith, and *the pacta sunt servanda* rule. Deriving from the concept of the sovereignty of States enshrined in Article 2(1) of the UN Charter, expression of consent is a manifestation of States' intention to be bound by a treaty, which is required for a treaty to be valid and have legal effect.<sup>87</sup> Such intention to be legally bound by an agreement is essential for successful treaty negotiations.<sup>88</sup> Article 11 of the VCLT is a reminder of this requirement by listing possible means of expressing consent: signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or any other agreed means. In addition, Article 9 bases the adoption of the treaty text on the consent of the negotiating States or a vote. However, expressing consent to be bound and becoming a party to a treaty does not always require that the State has taken part in the negotiations.

Articles 46-53 of the VCLT exhaustively list the grounds of invalidity of a State's consent to be bound by a treaty (VCLT Article 42(1)).<sup>89</sup> Articles 46 and 47 concern the competence and authority to conclude a treaty, Article 48 an error, and Article 53 of the VCLT a treaty's conflict with *jus cogens* norms. These grounds of invalidity do not relate to the bad faith conduct of States during negotiations and will not be discussed in the master thesis. The focus is on Articles 49-52 of the VCLT that protect the freedom of consent of the defrauded, corrupted, or coerced State (representative) from the bad faith of the defrauding, corrupting, or coercing State.<sup>90</sup>

#### ***Fraud***

Article 49 of the VCLT provides that '[i]f a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating

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<sup>87</sup> *SS 'Wimbledon'*, PCIJ Series A, No 1, 25 (1923), p 15; *Lotus*, PCIJ Series A, No 10 (1927), p 18; F. Hoffmeister in Dörr and Schmalenbach, VCLT Article 9(1)/8-10; Article 11/1; M. Fitzmaurice. Expression of Consent to Be Bound by a Treaty as Developed in Certain Environmental Treaties in J. Klabbers and R. Lefeber. Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag. The Hague, Boston, London: Martinus Nijhoff Publishers 1998, pp 59, 63, 80. See also Shaw, pp 9-11, 94; Korontzis in Hollis, pp 195-196; J. Klabbers. The Validity and Invalidity of Treaties in Hollis, pp 554, 557; A. Pellet. The Normative Dilemma: Will and Consent in International Law-Making. – Australian Yearbook of International Law 1998/3(12), pp 27, 35.

<sup>88</sup> Korontzis in Hollis, p 179.

<sup>89</sup> Klabbers in Hollis, p 559.

<sup>90</sup> T. Rensmann in Dörr and Schmalenbach, VCLT Article 49/2, Article 50/2, Article 51/1. See also Hassan, p 470.

its consent to be bound by the treaty.’<sup>91</sup> Fraud is the clearest antitheses of good faith.<sup>92</sup> Objectively, fraudulent conduct requires the inducement of an error in the other negotiating State by means of explicit or implicit misrepresentation or deception, e.g. by making false representations.<sup>93</sup> Exceptionally, non-disclosure of information may, depending on the nature of the contract and the prevailing circumstances, qualify as misrepresentation when disclosure is required by good faith, i.e. is legitimately expected.<sup>94</sup> It is doubtful whether a lack of intention to perform a treaty would amount to fraudulent conduct.<sup>95</sup>

A fraudulent causation of error is capable of invalidating consent ‘if the error relates to a fact or situation which was assumed by the [invoking] State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty’ (VCLT Article 48(1)).<sup>96</sup> An error is inexcusable and cannot be invoked if the State in question contributed to the error by its own conduct or circumstances were such as to put that State on notice of a possible error (VCLT Article 48(2)).

Subjectively, fraudulent conduct requires the intention to deceive, i.e. firstly, awareness of the untruthfulness of the representation or of the other negotiating State’s misapprehension. Secondly, intention to deceive requires the intention to mislead, i.e. to cause, maintain, or corroborate an error on the part of the other negotiating State ‘with a view to inducing that State to give consent to a treaty’.<sup>97</sup>

As an intriguing example, in April 2013, Timor-Leste instituted arbitral proceedings against Australia at the PCA<sup>98</sup> alleging the invalidity of the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea on the grounds of fraud because Australia engaged in espionage in the course of negotiating the Treaty. It is allegedly the first case in which a state seeks invalidity of a treaty on the grounds of fraud.<sup>99</sup> The details of the arbitration have not been made public and the proceedings are still pending at the PCA. Timor-Leste also initiated

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<sup>91</sup> M. E. Villiger opines that fraud is most likely to be limited to bilateral treaties. See M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Boston: Martinus Nijhoff Publishers 2009, VCLT Article 49/3.

<sup>92</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 49/2.

<sup>93</sup> *Ibid*, Article 49/13-14.

<sup>94</sup> *Ibid*, Article 49/16-18.

<sup>95</sup> *Ibid*, Article 49/7.

<sup>96</sup> *Ibid*, Article 48/11-13.

<sup>97</sup> *Ibid*, Article 49/22-24.

<sup>98</sup> Permanent Court of Arbitration. Arbitration under the Timor Sea Treaty (Timor-Leste v Australia). – <http://www.pcacases.com/web/view/37> (11 April 2016).

<sup>99</sup> Mitchell and Akande. To the author’s knowledge there have been no cases of fraud in the practice of the PCIJ or the ICJ. See also Thirlway, p 1308.

proceedings against Australia in the ICJ but dropped the case after the ICJ had ordered provisional measures.<sup>100</sup>

### ***Corruption and Coercion***

In addition to fraud, bad faith is also manifest in corruptive and coercive conduct that can be invoked to invalidate a State's consent to be bound by a treaty. Direct or indirect corruption of a representative of a State by another negotiating State (VCLT Article 50) means promising, offering, or giving the representative of another negotiating State an undue substantial pecuniary or non-pecuniary advantage 'in order to induce him or her to give consent to a treaty, which he or she would otherwise not have given.'<sup>101</sup>

Coercion of a representative of a State (VCLT Article 51) refers to procurement of consent through acts or threats directed against the representative in his or her private capacity and affecting his or her personal sphere, such as life, physical well-being, reputation, or people closest to him or her, 'which induce such fear in the representative, that he or she feels compelled to express the represented State's consent to be bound by the treaty in a manner which he or she would not have done without such compulsion.'<sup>102</sup> While for the purposes of the present master thesis, it is of importance that coercion by a negotiating State is a ground invalidating consent, Article 51 of the VCLT also encompasses coercion by third parties.<sup>103</sup>

### ***Threat or Use of Force***

Finally, Article 52 of the VCLT provides that a 'treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'<sup>104</sup> Threat or use of force is customarily to be understood as in Article 2(4) of the UN Charter prohibiting threat or use of armed force, and excluding political or economic coercion.<sup>105</sup> The 'Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties' and the 'Dissemination Resolution' accompanying it,<sup>106</sup> set the stage for a change in general practice and *opinio juris*

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<sup>100</sup> See also subsection 1.2.2 below.

<sup>101</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 50/8-13.

<sup>102</sup> *Ibid*, Article 51/13-21.

<sup>103</sup> *Ibid*, Article 51/24.

<sup>104</sup> See generally and with regard to peace treaties S. Forlati. Coercion as a Ground Affecting the Validity of Peace Treaties in E. Cannizzaro (Ed). The Law of Treaties beyond the Vienna Convention. Oxford: Oxford University Press 2011, pp 320 ff.

<sup>105</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 52/14, 28-32.

<sup>106</sup> UNCLOT, Final Act of the United Nations Conference on the Law of Treaties, UN Doc A/CONF.39/26, p 285.

regarding the definition of force for the purposes of the law of treaties.<sup>107</sup> However, international courts and tribunals have adopted a rather restrictive approach according to which ‘non-military coercion invalidates the rule if and only if it is obvious and out of proportion to the usual practices, which cannot be avoided, in an international society strongly marked by an imbalance of power.’<sup>108</sup>

To summarise, the VCLT recognises an obligation to negotiate treaties in good faith at least to the extent that it prohibits fraudulent, corruptive, and coercive conduct and illegal use of force by negotiating States. Since these are clearly established manifestations of bad faith conduct during negotiations, the author limits herself to making only a few comments of their status under customary international law or as general principles of law recognised by civilised nations in subsection 1.3. The process and consequences of invoking these grounds of invalidity will be discussed in subsection 3.1 of the master thesis.

### **1.2.1.2 Obligation Not to Defeat the Object and Purpose of the Treaty**

Article 18 of the VCLT imposes upon States an obligation not to frustrate the object and purpose of a treaty and of individual treaty provisions prior to its entry into force when:<sup>109</sup>

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

It aims to protect the negotiated agreement’s rationale and the legitimate expectation of the other participants in the treaty-making process.<sup>110</sup> Thus, Article 18 of the VCLT is a concretisation of the general principle of good faith.<sup>111</sup> It is an autonomous obligation under general international law and reflects customary international law.<sup>112</sup>

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<sup>107</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 52/29-32.

<sup>108</sup> Pellet, p 44 referring to *Fisheries Jurisdiction (United Kingdom v Iceland)*, ICJ Reports 1974, p 3 (hereinafter *Fisheries Jurisdiction*) and *Arbitration between Kuwait and American independent Oil Company (AMINOIL)*, 24 March 1982, 21ILM 976 (hereinafter *Kuwait-Aminoil*).

<sup>109</sup> See also M. E. Villiger. Customary International Law and Treaties: a Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties. Dordrecht: Martinus Nijhoff Publishers 1985, p 322; O. Dörr in Dörr and Schmalenbach, VCLT Article 18/33-34.

<sup>110</sup> Dörr in Dörr and Schmalenbach, Article 18/2; Rogoff, p 145.

<sup>111</sup> Dörr in Dörr and Schmalenbach, VCLT Article 18/4; P. Palchetti. Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation? in Cannizzaro, p 27.

<sup>112</sup> Villiger 1985, p 321; Dörr in Dörr and Schmalenbach, VCLT Article 18/4-5.

The obligation has been criticised as being vague and ineffective.<sup>113</sup> Regarding the content of the obligation, Article 18 of the VCLT, as opposed to provisional application in Article 25 of the VCLT, does not give full effect to the substance of the treaty.<sup>114</sup> The threshold for violating Article 18 of the VCLT is much higher than that for violating the treaty and refers to acts (or inactions),<sup>115</sup> whether committed intentionally in bad faith or not, rendering the subsequent performance of the treaty (provisions) impossible or inoperative, i.e. meaningless.<sup>116</sup> Possible examples include unilaterally creating situations of supervening impossibility of performance (Article 61 VCLT), fundamental change of circumstances (Article 62 VCLT), and engaging in conduct which would amount to a ‘material breach’ if the treaty were already in force (Article 62 VCLT), i.e. ‘the violation of a provision essential to the accomplishment of the object and purpose of a treaty’.<sup>117</sup>

Regarding effectiveness, the responsibility of a breaching State can only be invoked by States that have consented to the treaty.<sup>118</sup> They could claim cessation of the wrongful conduct and reparation, including the re-establishment of the pre-existing situation.<sup>119</sup> Since the ‘infringing’ party is free not to ratify the treaty, ‘the advantages that may be gained from invoking the responsibility of the wrongdoing state must be balanced against the risk of deterring that state from ratifying the treaty’ and, thus, such claims are rare in practice.<sup>120</sup>

The preparatory works of Article 18 of the VCLT provide interesting insights with regard to the possibility of extending the obligation not to frustrate the object and purpose of a treaty into the negotiating period. In 1959 Special Rapporteur (SR) Fitzmaurice proposed a draft article providing for a limited duty to negotiate in good faith:

1. Participation in a negotiation or an international conference, even where texts have been adopted by unanimity, does not involve any obligation to accept the text or to carry out its provisions.
2. This does not, however, affect such obligations as any participant in the negotiation may have according to general principles of international law to refrain for the time being from taking any action that might frustrate or adversely affect the purpose of the negotiation, or prevent the treaty producing its intended effect if and when it comes into force.<sup>121</sup>

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<sup>113</sup> Palchetti in Cannizzaro, pp 26, 36.

<sup>114</sup> Dörr in Dörr and Schmalenbach, VCLT Article 18/3, 30-32.

<sup>115</sup> *Ibid*, VCLT Article 18/39.

<sup>116</sup> *Ibid*, VCLT Article 18/36-38; Palchetti in Cannizzaro, pp 27, 29; Villiger 2009, VCLT Article 18/11-14.

<sup>117</sup> Palchetti in Cannizzaro, p 30.

<sup>118</sup> Dörr in Dörr and Schmalenbach, VCLT Article 18/32; Palchetti in Cannizzaro, p 31.

<sup>119</sup> Palchetti in Cannizzaro, p 32.

<sup>120</sup> *Ibid*, pp 31-32.

<sup>121</sup> International Law Commission. Report of the Commission to the General Assembly (UN Doc A/4169) in Documents of the eleventh session including the report of the Commission to the General Assembly. – Yearbook of the International Law Commission 1959/2. UN Doc A/CN.4/SER.A/1959, Article 8, p 101.

Paragraph 2 of the proposed article did not aim to create a new legal principle but merely recognised possible obligations under the general principles of international law.<sup>122</sup> In 1962 SR Waldock proposed a provision on negotiation. By only listing different possible fora for the drawing up of a treaty text, the provision was rather descriptive than normative and did not make it to the VCLT.<sup>123</sup>

A treaty is drawn up by a process of negotiation which may take place either through the diplomatic channel or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself.<sup>124</sup>

In SR Waldock's first report in 1962, the obligation was to arise also upon the adoption of the treaty text and the Drafting Committee extended it to States that had only entered into negotiations.<sup>125</sup> Thus, the 1962 Draft Article 17(1) and 1966 Draft Article 15(a)<sup>126</sup> included an obligation to negotiate treaties in good faith.<sup>127</sup> Some States supported this proposal arguing that good faith should guide every stage of treaty making.<sup>128</sup> However, many states opposed the obligation as having no supportive basis in international doctrine, case law, or practice,<sup>129</sup> and a proposal to delete it was adopted by roll-call vote by 50 to 33 with 11 abstentions.<sup>130</sup> T. Hassan suggests that the States did not so much deny the substance of good faith in negotiations but only its formulation.<sup>131</sup> Lack of an express treaty norm does not preclude imposing substantive obligations on negotiating States by customary international law or by general principles of law, such as the principles of good faith and prohibition of abuse of rights, applicable to the relations between States.<sup>132</sup>

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<sup>122</sup> International Law Commission. Report of the Commission to the General Assembly (UN Doc A/4169) in Documents of the eleventh session including the report of the Commission to the General Assembly. – Yearbook of the International Law Commission 1959/2. UN Doc A/CN.4/SER.A/1959, Article 8, p 102; Hassan, pp 470-471.

<sup>123</sup> Korontzis in Hollis, p 179.

<sup>124</sup> International Law Commission. Report of the Commission to the General Assembly (Document A/5208) in Documents of the fourteenth session including the report of the Commission to the General Assembly. – Yearbook of the International Law Commission 1962/2. UN Doc A/CN.4/SER.A/1962/Add.I, Article 5, p 166. See also Hassan, pp 471-472.

<sup>125</sup> Villiger 1985, pp 316-317; Dörr in Dörr and Schmalenbach Article 18/10, p 224.

<sup>126</sup> International Law Commission. Draft Articles on the Law of Treaties with commentaries 1966. – Yearbook of the International Law Commission 1966/2, p 202.

<sup>127</sup> Villiger 1985, p 317.

<sup>128</sup> Hassan, pp 475, 479. See also *North Sea Continental Shelf*, Separate Opinion of Judge Padillo Nervo, para 92.

<sup>129</sup> Dörr in Dörr and Schmalenbach, VCLT Article 18/11-12; Villiger 2009, VCLT Article 18/19; Hassan, pp 474-474.

<sup>130</sup> Villiger 1985, pp 318-319; Dörr in Dörr and Schmalenbach, VCLT Article 18/12. See also Hassan, pp 468-469.

<sup>131</sup> Hassan, p 476.

<sup>132</sup> *Ibid*; Wellens, p 46; Rogoff, pp 146, 158.

According to Article 31(3)(b) of the VCLT, subsequent practice, together with the context, in the application of the treaty is taken into account when interpreting the treaty. However, interpreting Article 18 of the VCLT as including an obligation to negotiate in good faith in the sense that States are prohibited from defeating the object and purpose of a treaty during negotiations would contradict the original wording and the intentions of the parties to the VCLT and would amount to an amendment of the treaty.<sup>133</sup> The opposition of States demonstrates a lack of customary international law basis for an obligation to negotiate treaties in good faith at least at the time of the adoption of the VCLT, either by way of lack of consistent state practice and/or *opinio juris*.<sup>134</sup> Subsequent practice is, nevertheless, relevant in analysing the emergence of a rule of customary international law in subsection 1.2.3. The preceding analysis supports the sub-hypothesis that in international treaty law the obligation to negotiate in good faith is regulated to a limited extent.

### 1.2.2 *Pacta de Negotiando* in the International Jurisprudence

*Pactum de negotiando* means an agreement to negotiate a treaty and is to be distinguished from *pactum de contrahendo*, i.e. agreement to conclude a treaty.<sup>135</sup> An agreement to negotiate a treaty must be carried out in good faith.<sup>136</sup> This stems directly from Article 26 of the VCLT which requires performance of treaties in good faith.<sup>137</sup> In some areas of international law the obligation to negotiate is inherent in the specific regime, e.g. maritime delimitation. The duty of good faith is also implicit in the obligation to settle disputes peacefully, e.g. by resorting to consensual negotiations. Thus, the meaning given to the obligation to negotiate in good faith is applicable both to *pacta de negotiando* and in the dispute settlement context. The following examples illustrate how the international courts have substantiated the obligation.

In the *Tacna-Arica* arbitration it was under issue whether Chile had breached its obligation to negotiate in good faith a protocol for the plebiscite that was to decide by popular vote whether the territory of the provinces of Tacna and Arica is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru. The arbitral tribunal

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<sup>133</sup> K. Wolfke. *Treaties and Custom: Aspects of Interrelation* in Klabbers and Lefeber, p 34.

<sup>134</sup> Villiger 1985, p 320. However, T. Hassan, notes that such a practice was at least emerging. See Hassan, pp 452-454.

<sup>135</sup> Aust, p 31.

<sup>136</sup> See e.g. *Railway Traffic between Lithuania and Poland*, Advisory Opinion, 1931, PCIJ Series A/B, No 42, p 116 (hereinafter *Railway Traffic Advisory Opinion*). See also P. B. Quagliato. *The Duty to Negotiate in Good Faith*. – *International Journal of Law and Management* 2008/50(5), pp 220-221.

<sup>137</sup> The requirement of good faith need not even be express in the agreement to negotiate. See *Interim Accord*, para 131.



stated that breaching the obligation to negotiate in good faith requires something more ‘than the failure of particular negotiations or the failure to ratify particular protocols’ such as a wilful/arbitrary refusal to proceed with negotiations or intent to prevent any reasonable agreement.<sup>138</sup> A wilful/or arbitrary refusal to proceed with negotiations would necessarily amount to an abuse of rights and a breach of good faith.

The first case where the PCIJ had to deal with the obligation to negotiate in good faith was in the *Railway Traffic between Lithuania and Poland Advisory Opinion* concerning a *pactum de negotiando* emanating from a Council of the League of Nations resolution adopted with the concurrence of Lithuania and Poland.<sup>139</sup> It recommended the two Governments to enter into direct negotiations ‘to establish such relations between the two neighbouring States as would ensure the good understanding on which peace depends’.<sup>140</sup> The negotiations, however, were fruitless regarding the re-establishment of the railway communication on the Landwarow-Kaisiadorys railway sector. In the advisory opinion the PCIJ considered that the engagement ‘is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements. [...] But an obligation to negotiate does not imply an obligation to reach an agreement.’<sup>141</sup> While the PCIJ makes no mention of good faith, P. B. Quagliato argues, and the author of the master thesis agrees, that the requirement to pursue negotiations ‘with a view to concluding agreements’ is a good faith standard.<sup>142</sup>

Agreements to negotiate were also considered by the ICJ in the *North Sea Continental Shelf* cases. The Special Agreements between Denmark and Germany and the Netherlands and Germany for the submission to the Court of a difference concerning the principles and rules of international law applicable to the delimitation of the continental shelf in the North Sea provided in Article 1(2) that the continental shelf shall be delimited in the North Sea ‘by agreement in pursuance of the decision requested from the International Court of Justice.’<sup>143</sup> ICJ held to that regard that

the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation

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<sup>138</sup> *Tacna-Arica question, Chile v Peru*, (1925) II RIAA 921 (hereinafter *Tacna-Arica question*), pp 929-930.

<sup>139</sup> See also Quagliato, pp 220-221.

<sup>140</sup> *Railway Traffic Advisory Opinion*, p 115.

<sup>141</sup> *Ibid*, p 116.

<sup>142</sup> Quagliato, pp 220-221.

<sup>143</sup> *North Sea Continental Shelf*, p 7.

so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.<sup>144</sup>

Before seeking guidance from the ICJ, negotiations between the parties had failed because they had insisted upon their own positions without contemplating any modification. The ICJ noted that the parties had not satisfied the conditions which are quoted above. Thus, governments should be willing to and in some circumstances are required to compromise in negotiations.<sup>145</sup> While the ICJ again made no mention of good faith, willingness to compromise necessarily amounts to good faith conduct, as lack of it would be an abuse of rights.

Moreover, maritime delimitation, including delimitation of continental shelf, is an area of international law where there is no room for unilateral delimitation and, thus, the obligation to negotiate is inherent in the regime of maritime delimitation.<sup>146</sup> Hence, the obligation to negotiate protects other States from one State's abuse of rights. For example, in the *Gulf of Maine* case the ICJ emphasised that the parties were under a duty to negotiate 'in good faith, with a genuine intention to achieve a positive result.'<sup>147</sup> Interpreting its decision in *Continental Shelf (Tunisia v Libya)* the ICJ held that the relevant Special Agreement is a *pactum de contrahendo* by which the parties had undertaken to conclude a treaty and, thus, the obligation to conduct negotiations in a meaningful way is even stronger.<sup>148</sup>

A treaty-based obligation to negotiate delimitation of continental shelf is contained in Articles 76 and 83 of the UNCLOS.<sup>149</sup> Article 83(3) of the UNCLOS also provides that pending agreement 'the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.' This language clearly reflects the obligation of the concerned States to negotiate in good faith.

Similarly to maritime delimitation, in the international fisheries law, the obligation to negotiate derives implicitly from the compelling need of conservation. The ICJ in the *Fisheries Jurisdiction* case stated that States are obliged to examine not unilaterally but

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<sup>144</sup> *North Sea Continental Shelf*, para 85(a).

<sup>145</sup> Quagliato, p 221.

<sup>146</sup> *North Sea Continental Shelf*, para 47. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p 18 (hereinafter *Continental Shelf (Tunisia v Libya)*), para 87; Wellens, p 25.

<sup>147</sup> *Gulf of Maine*, paras 87, 112(1).

<sup>148</sup> *Continental Shelf (Tunisia/Libya) Interpretation of Judgment*, ICJ Reports 1985, p 192 (hereinafter *Continental Shelf (Tunisia v Libya) Interpretation*), paras 48 and 67.

<sup>149</sup> See e.g. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p 303, para 26(5)(b).

together the necessary measures to be adopted.<sup>150</sup> Further, the exercise of preferential rights implicitly requires that the extent of such rights is defined or delimited via negotiations,<sup>151</sup> conducted on the basis that ‘each must in good faith pay reasonable regard to the legal rights of the other’.<sup>152</sup> Disregarding the legal rights of the other would contradict with the principle of the protection of legitimate interests and would also amount to an abuse of rights.

In the same vein, the conflicting interests aroused by the industrial use of international rivers must be reconciled by mutual concessions embodied in a comprehensive agreement as in such cases a State cannot unilaterally decide whether its actions affect another State's interests. Thus, in the *Lake Lanoux* arbitration the arbitral tribunal held that there is an obligation to seek to enter into agreements, the potentially affected party has a right to information on proposals, and that ‘[c]onsultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities.’<sup>153</sup>

In the words of the arbitral tribunal, the obligation to ‘strive to conclude’ agreement further entails ‘an obligation to accept in good faith all communications and contacts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements’.<sup>154</sup> Further, it encompasses taking into consideration the various interests involved giving them ‘every satisfaction compatible with the pursuit of its own interests’ and showing that ‘in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.’<sup>155</sup> The arbitral tribunal also brought out examples when negotiations would fail to comply with these rules:

sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.<sup>156</sup>

These are clearly examples of abuse of rights. In similar language, the *Kuwait-Aminoil* arbitration tribunal explained that the general principles of good faith that must be observed during negotiations include the ‘sustained upkeep of the negotiations over a period

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<sup>150</sup> *Fisheries Jurisdiction*, para 57.

<sup>151</sup> *Fisheries Jurisdiction*, paras 32, 74-75.

<sup>152</sup> *Ibid*, paras 32, 74-75, 78.

<sup>153</sup> *Lake Lanoux Arbitration, Spain v France*, (1957) XII RIAA 281 (hereinafter *Lake Lanoux*), pp 15-16.

<sup>154</sup> *Ibid*, para 13.

<sup>155</sup> *Ibid*, para 22.

<sup>156</sup> *Ibid*, para 11 referring to *Tacna-Arica question* and *Railway Traffic*.

appropriate to the circumstances;<sup>157</sup> awareness of the interests of the other party; and a persevering quest for an acceptable compromise.’<sup>158</sup>

It is important to distinguish agreements to negotiate from agreements to agree. The arbitral tribunal in the *German External Debts* arbitration analysed at length, by making reference also to the *North Sea Continental Shelf* cases, an undertaking to negotiate a dispute relating to claims of Greece arising out of the Mixed Graeco-German arbitral tribunal’s determination of World War I claims against Germany.<sup>159</sup> The *pactum de negotiando* derived from Article 19(1)(a) of the London Agreement on German External Debts coupled with paragraph 11 of its Annex I. The latter provides that the preliminary exchange of views should be followed by ‘further discussions’ resulting, depending on approval, in the Intergovernmental Agreement. The Tribunal distinguished the agreement from a *pactum de contrahendo*, and stated that:

a *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way. [...] [It] involves an understanding to deal with the other side with a view to coming to terms. [...] the Tribunal does not conclude that [it] absolutely obligates either side to reach an agreement, [...] [but] require[s] the parties to negotiate, bargain, and in good faith attempt to reach a result acceptable to both parties and thus bring an end to this long drawn out controversy.<sup>160</sup>

Thus, the arbitral tribunal emphasised the obligation upon the negotiating parties to make a good faith effort and compromise with a view to reaching an agreement,<sup>161</sup> i.e. to refrain from an abuse of rights. A genuine effort to negotiate implies that parties have to realise that achievement of even nearly full satisfaction is unlikely and it is important that “the irreducible objectives” – the identification of which may require “several rounds of consideration” – “should not be incompatible”.<sup>162</sup>

*Pacta de negotiando* are common in treaties seeking to eliminate weapons of mass destruction. As an example, Article VI of the 1968 NPT imposes upon the parties an obligation to negotiate in good faith:

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<sup>157</sup> The PCIJ has emphasised that the length of negotiations depends on the circumstances. See *Mavrommatis Palestine Concessions*, PCIJ Series A, No 2 (1924), p 13 (hereinafter *Mavrommatis*).

<sup>158</sup> *Kuwait v Aminoil*, para 70.

<sup>159</sup> *Kingdom of Greece v Federal Republic of Germany*, (1972) 47 ILR 418 (hereinafter *German External Debts*).

<sup>160</sup> *Ibid*, para 62.

<sup>161</sup> See also White in Lowe and Warbrick, pp 233-234.

<sup>162</sup> Wellens, p 140.

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Similarly, Article IX of the 1972 Biological Weapons Convention obliges states to continue negotiations for a treaty on chemical weapons.<sup>163</sup> It is reasonable to state that the obligation to negotiate in good faith imposed by these provisions is to be conceptualised in the same manner as the international courts have done, i.e. that States are to conduct negotiations in a meaningful way being willing to compromise and with a view to reaching an agreement.<sup>164</sup>

The ICJ in its *Nuclear Weapons* advisory opinion has gone even further by unanimously considering Article VI of the NPT a *pactum de contrahendo*:

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.<sup>165</sup>

The ICJ's conclusion is somewhat surprising as the international jurisprudence has been reluctant to impose an obligation of result.<sup>166</sup> Arguments have been advanced in favour and against the ICJ's decision.<sup>167</sup> Perhaps the ICJ was at pains being unable to rule out the legality of possessing nuclear weapons under international law<sup>168</sup> and was, thus, trying to push the States to conclude a treaty to that regard. The object of Article VI, supported by the preamble of the NPT, is complete nuclear disarmament. Nevertheless, the details of such a treaty need to be negotiated in good faith. The author of the master thesis recalls the ICJ's interpretation of the decision in *Continental Shelf (Tunisia v Libya)* that in the case of a *pactum de contrahendo* the obligation to conduct negotiations in a meaningful way is even stronger.<sup>169</sup> If upheld by the Court, it could create a nuclear disarmament obligation under the auspices of

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<sup>163</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. – RT II 1993, 15, 19. The Chemical Weapons Convention was adopted in 1992, after 12 years of negotiations, and entered into force in 1997. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. – RT II 1999, 11, 72.

<sup>164</sup> White in Lowe and Warbrick, p 233. E.g. *North Sea Continental Shelf*, para 85(a); *Continental Shelf (Tunisia v Libya) Interpretation*, paras 48, 67.

<sup>165</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p 226 (hereinafter *Nuclear Weapons Advisory Opinion*), para 99. See also Wellens, p 24.

<sup>166</sup> Wellens, p 38. K. Wellens further argues that '[t]he distinction between *obligations of conduct* and *of result* is "unsatisfactory", "particularly in domains of *protection*", and the peremptory nature of for instance the prohibition of torture, and the human rights nature of the Convention against Torture as such entails that States party are under obligations of result.' See Wellens, p 38.

<sup>167</sup> See S. David. Article VI of the Non-Proliferation Treaty is a *Pactum De Contrahendo* and Has Serious Legal Obligation by Implication. – Journal of International Law & Policy 2004-2005/2.

<sup>168</sup> *Nuclear Weapons Advisory Opinion*, para 65.

<sup>169</sup> *Continental Shelf (Tunisia/Libya) Interpretation*, paras 48, 67.

Article VI NPT.<sup>170</sup> To date, there is no agreement on complete nuclear disarmament. Therefore, a possible breach of Article VI of the NPT is analysed in section 3.3 to illustrate the consequences.

The duty to negotiate is not limited to provisions including the negotiations language. In *Pulp Mills*, the ICJ stated that the mechanism of co-operation as agreed between the States is governed by the principle of good faith, recalling that trust and confidence are inherent in international co-operation.<sup>171</sup> The ICJ further reaffirmed that negotiations must be conducted in a meaningful way but there is no obligation to reach an agreement.<sup>172</sup> The duty to co-operate entails ‘first a duty to consult in good faith and then later on “to negotiate the various arrangements needed.”’<sup>173</sup> Ignorance of the obligation to co-operate amounting to an abuse of right is in breach of a duty to act in good faith.<sup>174</sup>

In the dispute settlement context regarding compromissory clauses requiring negotiations as a precondition for the jurisdiction, the ICJ has held that ‘negotiations must relate to the subject matter of the treaty’, i.e. ‘concern the substantive obligations contained in the treaty in question’.<sup>175</sup> Such negotiations require at the very least ‘a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute’, thus, emphasising the importance of starting negotiations.<sup>176</sup>

In the *Interim Accord* case, the ICJ reaffirmed the meaning of negotiations ‘for the purposes of dispute settlement, or the obligation to negotiate’ as clarified through the jurisprudence of the ICJ and of its predecessor PCIJ, as well as arbitral awards.<sup>177</sup> It is useful to reproduce the list provided therein. The obligation to negotiate requires States:

- 1) to enter into negotiations and also to pursue them as far as possible, with a view to concluding agreements but with no obligation to reach an agreement;<sup>178</sup>
- 2) to pursue lengthy negotiations of necessity;<sup>179</sup>

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<sup>170</sup> David, p 2.

<sup>171</sup> *Pulp Mills*, para 145 referring to *Nuclear Tests (Australia v France)*, para 46 and *Nuclear Tests (New Zealand v France)*, para 49. The ICJ in *Pulp Mills* further emphasised that the international customary law rule of *pacta sunt servanda* applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States.

<sup>172</sup> *Pulp Mills*, paras 146 and 150.

<sup>173</sup> Wellens, p 24; *Interpretation Agreement between WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p 73, para 49.

<sup>174</sup> See also White in Lowe and Warbrick, p 245.

<sup>175</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p 70 (hereinafter *CERD case*), paras 157, 160.

<sup>176</sup> *CERD case*, para 157.

<sup>177</sup> *Interim Accord*, paras 131-132.

<sup>178</sup> *Railway Traffic*, p 116. See also *Pulp Mills*, para 150.

- 3) to conduct themselves so that the ‘negotiations are meaningful’, i.e. not to insist ‘upon its own position without contemplating any modification of it’,<sup>180</sup> and not to obstruct negotiations, for example, by interrupting communications or causing delays in an unjustified manner or disregarding the procedures agreed upon;<sup>181</sup>
- 4) to pay reasonable regard to the interests of the other.<sup>182</sup>

The ICJ also noted that the duty to negotiate in good faith need not even be express<sup>183</sup> as it is ‘firmly rooted in general international law’<sup>184</sup> and, thus, may be implicit in a particular provision on negotiations between the States.<sup>185</sup> The approach of the ICJ is in keeping with Article 26 of the VCLT. Hence, good faith also applies, for example, to obligations to undertake negotiations on arms control.<sup>186</sup>

Action not in good faith is a breach of a general international law obligation, even if it is a breach which is hard to establish and whose consequences may be uncertain.<sup>187</sup> There is a presumption in favour of good faith.<sup>188</sup> The proof required for finding the existence of bad faith requires more than the failure of particular negotiations.<sup>189</sup> The required proof may be supplied by circumstantial evidence; however, it must be indisputable and convincing as to the intent to prevent any reasonable agreement.<sup>190</sup> Whether and what consequences could follow a breach of an express or implicit obligation to negotiate in good faith are discussed in the third chapter of the master thesis.

### 1.2.3 Obligation to Negotiate in Good Faith in Customary International Law

This subsection aims to comment upon the potential customary law status of the VCLT grounds invalidating consent as discussed in subsection 1.2.1.1 and to analyse further indications of the evolution of the obligation to negotiate in good faith into a norm of customary international law.

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<sup>179</sup> *Mavrommatis*, p 13.

<sup>180</sup> *North Sea Continental Shelf*, para 85. See also *Pulp Mills*, para 146.

<sup>181</sup> *Lake Lanoux*, p 307.

<sup>182</sup> *Fisheries Jurisdiction*, para 78.

<sup>183</sup> *Interim Accord case*, para 131. See also *Nuclear Tests*, para 46; Thirlway, p 23.

<sup>184</sup> *Pulp Mills*, Separate Opinion of Judge Greenwood, para 16.

<sup>185</sup> *Interim Accord*, para 131.

<sup>186</sup> See also B. O’Neill. What Does it Mean for Nations to ‘Negotiate in Good Faith’?. – Center for International Security and Cooperation Stanford University 2001 (Draft). – <http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf> (28 April 2016), p 2.

<sup>187</sup> White in Lowe and Warbrick, p 245.

<sup>188</sup> *Factory at Chorzów (Claim for Indemnity)*, PCIJ, Series A, No 17 (1928), p 47 (hereinafter *Factory at Chorzów*); *Nuclear Tests (Australia v France)*, para 60; *Nuclear Tests (New Zealand v France)*, para 63; *Nicaragua*, para 101.

<sup>189</sup> *Tacna-Arica question*, p 933.

<sup>190</sup> *Ibid.*

The establishment of a rule of customary international law requires uniform and consistent State practice and States' *opinio juris sive necessitatis*, i.e. acceptance of State practice as law.<sup>191</sup> State practice includes any acts, statements, other behaviour, and even inaction of a State disclosing its recognition of a customary rule.<sup>192</sup> The International Law Commission (ILC) has listed as evidence of customary international law: 'treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations.'<sup>193</sup> *Opinio juris sive necessitatis* is a State's conviction of being under a legal obligation to act in a certain way or otherwise be subjected to a sanction.<sup>194</sup>

### ***State Practice***

It would be an overwhelming task to assess the conduct of the States in the process of each and every treaty negotiation. States' abstention from bad faith conduct in their treaty negotiations necessarily is positive state practice; however, it does not offer any guidance whether States perceive the good faith as a moral or legal obligation. Thus, the conduct of States is to be assessed upon deviations from good faith conduct that are publicly not tolerated by States. However, allegations of bad faith are rather rare and there might be several reasons for this. Allegations of bad faith are difficult to prove. Thus, the *opinio juris* of States as evidenced in treaties and in the practice of international organisations, e.g. the UNGA resolutions, is of utmost importance when establishing the customary international law status of a legal obligation to negotiate in good faith.

While the VCLT largely reflects customary international law, opinions diverge whether this is so with regard to the grounds of invalidity listed in Articles 49-52 of the VCLT. It is accepted that coercion of a State by the threat or use of force (VCLT Article 52), which reaffirms the prohibition in Article 2(4) of the UN Charter, reflects customary international law.<sup>195</sup> Coercion of a State representative (VCLT Article 51), on the other hand, is considered to reflect customary international law by T. Rensmann but not by J. Klabbers.<sup>196</sup>

T. Rensmann and J. Klabbers find it unlikely that fraud (VCLT Article 49) and corruption (VCLT Article 50) reflect customary international law because conclusive international

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<sup>191</sup> Shaw, p 74; *Nuclear Weapons Advisory Opinion*, para 64. See also Villiger 1985, pp 3-4; Wolfke in Klabbers and Lefeber, p 31.

<sup>192</sup> Shaw, p 84; Villiger 1985, p 4.

<sup>193</sup> Villiger 1985, p 4.

<sup>194</sup> Shaw, pp 75, 84-89; Villiger 1985, p 26.

<sup>195</sup> Forlati in Cannizzaro, pp 322-325.

<sup>196</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 51/32, Article 52/53.



practice is lacking.<sup>197</sup> However, the opposite is proposed by M. E. Villiger.<sup>198</sup> J. Klabbers admits that the scarcity of practice might result from a reluctance to publicly admit being defrauded or coerced.<sup>199</sup> In addition, the author of the master thesis emphasises that the States' abstention from such bad faith conduct in their treaty negotiations is a factor contributing to the emergence of customary international law. While there is doubt as to the customary international law status of the articles on fraud and corruption,<sup>200</sup> T. Rensmann suggests that these concepts are expressions of general principles of law recognised by civilised nations.<sup>201</sup>

While Article 18 of the VCLT is accepted to reflect customary international law,<sup>202</sup> the opposition of States to the 1966 Draft Article 15(a) demonstrates a lack of customary international law basis for an obligation to negotiate treaties in good faith at least at the time of the adoption of the VCLT due to lack of consistent State practice and *opinio juris*.<sup>203</sup>

After the adoption of the VCLT, certain patterns of good faith State behaviour are continually emphasised and detailed in the practice of the international courts as discussed in subsection 1.2.2 of the master thesis. For example, the 1969 *North Sea Continental Shelf* cases, the 1972 *German External Debts* case, the 1974 *Fisheries Jurisdiction* case, the 1982 *Kuwait-Aminoil Arbitration*, the 1982 and 1984 *Continental Shelf* cases, the 1984 *Gulf of Maine* case, and the 1996 *Nuclear Weapons Advisory Opinion*.

The following examples evidence State practice. M. E. Villiger brings out the 1979 call of the Netherlands Government to the UN Secretary General for establishing, on the basis of good faith and Article 18 of the VCLT, a “semi-commitment” of States to shorten the period between adoption and ratification of a treaty text<sup>204</sup> and the 1981 observation by the Norwegian ambassador, by analogy with Article 18 of the VCLT, that ‘renunciation of parts of the package deal leading to the LoS Convention would defeat the object and purpose of the 1973 UNCLOS III gentleman’s agreement on which the package was established.’<sup>205</sup>

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<sup>197</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 49/37, Article 50/16; Klabbers in Hollis, p 567.

<sup>198</sup> Villiger 2009, VCLT Article 49/8, VCLT Article 50/10.

<sup>199</sup> Klabbers in Hollis, pp 566, 568.

<sup>200</sup> J. Verhoeven disagrees that corruption is a general principle of law recognised by civilised nations. J. Verhoeven. Invalidity of Treaties: Anything New in/under the Vienna Conventions? in Cannizzaro, p 303.

<sup>201</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 49/5-6, 12, 37, Article 50/16-17, Article 51/2. It is interesting to note that the grounds of invalidity were inspired by civil law traditions the rapporteurs of the ILC being mostly common law lawyers. See Verhoeven in Cannizzaro, p 300.

<sup>202</sup> Dörr in Dörr and Schmalenbach, VCLT Article 18/5.

<sup>203</sup> Villiger 1985, p 320.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

The existence of State practice has also been confirmed in 1999, when the UNGA adopted Resolution 53/101 ‘Principles and guidelines for international negotiations’, which affirms that ‘[n]egotiations should be conducted in good faith’ and that ‘States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress’.<sup>206</sup> The latter point is in its wording similar to the drafts of Article 18 of the VCLT. Thus, the negotiating States should also not prejudice the execution of the envisaged treaty, e.g. by frustrating its object and purpose.<sup>207</sup> However, UNGA resolutions are not binding in their nature as Articles 10-14 of the UN Charter allow the UNGA only to make recommendations.<sup>208</sup> The title of the resolution refers to principles and guidelines, which generally are of secondary or non-binding character, respectively. The wording of the resolution also refers to the soft law character of the resolution by recognising that the resolution ‘could’ rather than ‘shall’ offer a general, non-exhaustive frame of reference for negotiations.<sup>209</sup>

### *Opinio Juris*

The ICJ has accepted that UNGA resolutions can be regarded as evidence for the existence of *opinio juris*.<sup>210</sup> It has been argued that unanimously adopted UNGA resolutions reflect a *communis opinio juris* sufficient to instantly form customary law.<sup>211</sup> Therefore, UNGA resolutions are often taken as a starting point for the process of customary international law.<sup>212</sup> However, A. Pellet argues that *opinio juris* can only occur after the constitutive State practice.<sup>213</sup> Nevertheless, the legal value of the UNGA resolutions must be assessed in light of all the circumstances and in the context of a wider framework of legal rules.<sup>214</sup>

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<sup>206</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, para 2(a) and (e). See also Wellens, pp 42, 45. UNGA resolutions might reflect the state of customary international law at the time of the adoption of the resolution and the debate and voting patterns are elements of State practice. See Villiger 1985, p 144; Brownlie, p 42; Shaw, p 83; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, pp 136, para 86.

<sup>207</sup> Wellens, pp 45-46; Hassan, p 449.

<sup>208</sup> Villiger 1985, p 143. See also Pellet, pp 51-52.

<sup>209</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, recital 9.

<sup>210</sup> Shaw, p 88. E.g. *Nicaragua*, paras 188-189, 191, 203-204. See also Pellet, pp 36, 52; Brownlie, p 42. UNGA resolutions may serve as authoritative interpretations of the UN Charter, a basis for concluding treaties, codifications or developments of international law. See Villiger 1985, p 144. They have a degree of legitimacy owing to the UNGA’s role as a validation authority. See Pellet, p 52.

<sup>211</sup> Villiger 1985, p 29; Shaw, p 78.

<sup>212</sup> Pellet, pp 36, 52.

<sup>213</sup> *Ibid*, p 36.

<sup>214</sup> *Ibid*, p 49; Brownlie, p 42.

The UNGA resolution ‘Principles and guidelines for international negotiations’ (hereinafter the Resolution) was adopted without a vote, i.e. by consensus.<sup>215</sup> It is generally recognised that the value of UNGA’s declarations of principles as elements in the formative practice of customary law is higher when they are adopted by unanimity or by consensus compared to other methods of decision making.<sup>216</sup> On the other hand, it has been argued that this is not necessarily the case in the United Nations.<sup>217</sup> The value of consensus is lower than unanimity, especially if States add inconsistent statements or reservations,<sup>218</sup> because consensus gives only one indication as to a *communis opinio juris* and, thus, it is not sufficient for the instant emergence of customary international law.<sup>219</sup> Moreover, it is argued that due to the lack of voting record, consensus impoverishes State practice, which might result in prolonging the formation of customary international law.<sup>220</sup> No statements or reservations were made to the Resolution. Thus, it has contributed to the development of customary international law.

The legal value of UNGA resolutions must be assessed in the context of a wider framework of legal rules. In Article 1 of the Resolution, the UNGA *reaffirms* principles of international law relevant to international negotiations. These include the principle of sovereign equality of all States, duty of non-intervention in domestic matters, *(p)acta sunt servanda* rule, prohibition of the threat or use of force and the invalidating effect coercion on treaties, duty to cooperate in international relations, and duty to settle disputes peacefully. These principles derive already from the UN Charter and also reflect customary international law. Thus, on the one hand, it can be argued that the customary nature of these principles of international law spills over to the obligation to negotiate in good faith in international law. On the other hand, the *guidelines* for negotiations, the *identification* of which aims to enhance the predictability of the negotiating States, are *affirmed* by the UNGA. Thus, the Resolution rather develops than codifies international law regarding negotiations.<sup>221</sup> Nevertheless, the consensual adoption of the resolution gives at least one indication of a *communis opinio juris* and is, thus, relevant with regard to the formation of customary international law.<sup>222</sup>

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<sup>215</sup> Generally the term consensus is used to mean a unanimous agreement adopted without a formal vote, however, these two elements are not always combined. See B. Conforti. *The Law and Practice of the United Nations*. 3<sup>rd</sup> ed. Leiden, Boston: Martinus Nijhoff Publishers 2005, p 81.

<sup>216</sup> Conforti, p 301.

<sup>217</sup> Lindell, p 40.

<sup>218</sup> See also Conforti pp 99, 310.

<sup>219</sup> Villiger 1985, p 9.

<sup>220</sup> *Ibid.*

<sup>221</sup> See also UNGA, Report of the Secretary General (3 September 1998) UN Doc A/53/332, comment by Libyan Arab Jamahiriya.

<sup>222</sup> See also Villiger 1985, p 9.

The guidelines listed after the obligation to ‘conduct negotiations in good faith’ are reflective of the international jurisprudence on the obligation to negotiate in good faith. For example, States should take due account of the importance of engaging in international negotiations States whose vital interests are directly affected, which is in keeping with the obligation to consider the rights and interests of others as expressed e.g. in the *Fisheries Jurisdiction* and *Lake Lanoux* cases.<sup>223</sup> Further, States’ obligations to ‘facilitate the pursuit or conclusion of negotiations by remaining focused throughout on the main objectives of the negotiations’<sup>224</sup> and to ‘use their best endeavours to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations’<sup>225</sup> are reflective of the international jurisprudence’s standard of conducting negotiations in good faith ‘with a view to reaching agreement’<sup>226</sup> and being willing to compromise.<sup>227</sup> The obligation of States to ‘adhere to the mutually agreed framework for conducting negotiations’ stems from the principle of *pacta sunt servanda*.

### ***Affirmative Judicial Practice***

The practice of the international courts following the adoption of the Resolution further supports the customary international law status of the obligation to negotiate in good faith. The 2010 *Pulp Mills* case applied the good faith standard to a co-operation mechanism and the 2011 *Interim Accord* case emphasised that the good faith requirement need not be express in agreements to negotiate. The meaning given to good faith conduct is continuously specified in the international jurisprudence. In 2014 in *Timor-Leste v Australia*, a case related to the pending proceedings in the PCA, Timor-Leste argued that ‘[t]he seizure and detention of documents and data allegedly relating to one party’s positions and strategies regarding a future process of negotiations “manifestly distorts the character” of this process by placing that party “at a considerable negotiating disadvantage”’.<sup>228</sup> The ICJ found Australia’s conduct to violate Timor-Leste’s sovereignty and ordered Australia, as a provisional measure, not to

interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and

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<sup>223</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, para 2(b). Regarding *erga omnes* obligations it means taking into account the legitimate interests of all States. See Wellens, p 41.

<sup>224</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, para 2(f).

<sup>225</sup> *Ibid*, para 2(g). See also *North Sea Continental Shelf*, Separate Opinion of Judge Padillo Nervo, para 92.

<sup>226</sup> *Railway Traffic*, p 116; *Pulp Mills*, para 150.

<sup>227</sup> *North Sea Continental Shelf*, para 85; *Pulp Mills*, para 146.

<sup>228</sup> Wellens, p 42; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Provisional Measures, Order of 3 March 2014, ICJ Reports 2014, p 147 (hereinafter *Timor-Leste v Australia*), CR 2014/1, pp 16-17, para 3 (Timor-Leste).

Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.<sup>229</sup>

While the ICJ made no mention of good faith, the principle of sovereignty is relevant to good faith international negotiations.<sup>230</sup> Thus, good faith negotiations also require not interfering in any way in a State's communications with its legal advisers. The exact content of the obligation to negotiate in good faith depends on the circumstances of each particular case.<sup>231</sup>

Since over a long period of time no State has expressly or implicitly disclosed its dissatisfaction with the rule on the obligation to negotiate in good faith as emerging in the international jurisprudence or as expressed in the Resolution, such qualified silence has contributed towards the formation of customary international law<sup>232</sup> and can be construed as acquiescence on which other States may come to rely.<sup>233</sup> Thus, in light of all the circumstances and the context of a wider framework of legal rules, the author of the master thesis is of the opinion that the obligation to negotiate in good faith in the Resolution is an obligation of customary international law and, thus, the relevant sub-hypothesis has found support.

### **1.3 The Applicability of the Principle of Good Faith to All International Negotiations**

It has been confirmed in the previous sections that obligations to negotiate having a general international law or conventional basis must be conducted in good faith. Undoubtedly, good faith behaviour during international negotiations is naturally expected from States, and the principle of good faith applies to all negotiations as a moral standard. However, the author of the master thesis argues that the obligation to negotiate in good faith applies to all negotiations, including negotiations undertaken voluntarily.<sup>234</sup> This obligation is not merely a moral one but a legal one, the breach of which entails legal consequences.

M. A. Rogoff has argued without much analysis that good faith is 'a normative and general principle of international law' which 'presumably also applies to *all dealings* between States'<sup>235</sup> and, thus, acts as a presumption and requirement for both the negotiation process and the performance of the reached agreement.<sup>236</sup> R. Kolb argues that good faith is

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<sup>229</sup> *Timor-Leste v Australia*, para 55.

<sup>230</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, para 1.

<sup>231</sup> Wellens, p 40; Hassan, p 480.

<sup>232</sup> Villiger 1985, p 19.

<sup>233</sup> *Ibid*; Shaw, p 89; *Gulf of Maine*, para 130.

<sup>234</sup> See also Hassan, pp 444, 479; Wellens, p 23.

<sup>235</sup> Rogoff, p 147 (emphasis added).

<sup>236</sup> Wellens, p 43.

‘consubstantial with the idea of negotiations’.<sup>237</sup> According to J. F. O’Connor, the principle of good faith is ‘relevant in the negotiation of treaties, in so far as normal rules, such as estoppel, may not be applicable.’<sup>238</sup> Since there is no existing general obligation to negotiate in international law, the author of the master thesis finds there to be a dilemma whether the principle of good faith could apply to all negotiations.

Negotiations are consensual in character. States have the right to negotiate but they must not abuse that right. Thus, even when negotiating parties have not concluded and do not conclude an express agreement to negotiate or regulate the framework for their negotiations, the States’ conduct and exchange of communications eventually culminate in an implied agreement to negotiate to which the principle of good faith should apply. Moreover, negotiations, in particular for norm-creative treaties, are not always started in order to settle existing disputes. Naturally, competing interests may and do arise during negotiations but it would be unreasonable to let a dispute crystallise for the principle of good faith to apply.

Substantive obligations on negotiating States can be imposed by customary international law or by general principles of law, such as the principles of good faith and prohibition of abuse of rights,<sup>239</sup> applicable to the relations between States.<sup>240</sup> It has been argued in section 1.2.3 that the Resolution is of customary international law character and the guidelines, in essence, specify the doctrine of abuse of rights. Neither the Resolution’s title nor content are limited to the obligation to settle disputes peacefully and in good faith. International negotiations are also seen as a flexible, constructive, and effective means for the *management* of international relations and for the *creation* of new international norms of conduct of States.<sup>241</sup> The ICJ has in the *Nuclear Tests* cases stated that the principle of good faith governs both the ‘*creation* and performance of legal obligations, whatever their source’.<sup>242</sup> Thus, the guidelines and principles in the Resolution apply to all negotiations.

The case law of the international judiciary supports the conclusion. In *German External Debts* the arbitral tribunal emphasised that a State’s adherence to its previous stand and insisting upon the complete capitulation of the other side would be inconsistent with the term

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<sup>237</sup> *Interim Accord*, Dissenting opinion of Judge *ad hoc* Roucounas, para 28 citing R. Kolb. *La bonne foi en droit international public*. Paris: Presses Universitaires de France 2000, p 588. See also Wellens, p 43.

<sup>238</sup> O’Connor, pp 122-124.

<sup>239</sup> In the present master thesis, the prohibition of abuse of rights is considered to be a concretization of the principle of good faith (see subsection 1.1.1 above). See also Hassan, p 448.

<sup>240</sup> Wellens, p 46; Rogoff, pp 146, 158.

<sup>241</sup> UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101, recitals 4 and 7 (emphasis added).

<sup>242</sup> *Nuclear Tests (Australia v France)*, para 46; *Nuclear Tests (New Zealand v France)*, para 49. See also *Pulp Mills*, para 145.

‘negotiation’.<sup>243</sup> Thus, in all negotiations States should be willing to compromise. In the *North Sea Continental Shelf* cases, the ICJ noted that the obligation to negotiate in a meaningful way ‘merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.’<sup>244</sup> Thus, the ICJ implied that in all international relations, including international negotiations in general, the parties should conduct themselves in accordance with the principle of good faith.

Furthermore, the applicability of the principle of good faith to all international negotiations is demanded by the interests of international peace.<sup>245</sup> The tribunal in the *German External Debt* arbitration emphasised the desirability in international relations of reaching a positive satisfactory and equitable result to ensure peace and the well-being of the community and to avoid incalculable harm.<sup>246</sup> In any and all negotiations conflicts may arise and it would be unreasonable to let those crystallise into disputes for the principle of good faith to apply. Thus, it is desirable that there is an obligation to conduct all negotiations in good faith in international law. Lending the words from H. Thirlway, ‘to negotiate otherwise than in good faith is surely not to negotiate at all.’<sup>247</sup>

### ***Requirements of Negotiations in Good Faith***

Negotiations aiming at the codification of international law or norm creation are similar to negotiations for the peaceful settlement of disputes. However, according to K. Wellens, the latter might be subject to more rigid conditions that the ICJ has determined with regard to ‘the proper conduct of negotiations in general’ and which have become classical now.<sup>248</sup> The author of the master thesis is of the opinion that the conditions for the negotiations are the same with few exceptions. While *pacta de negotiando*, and moreover, *pacta de contrahendo*, whether having a general international law or conventional basis, require starting negotiations with honesty and sincerity,<sup>249</sup> there is in general international law no obligation to enter into negotiations. However, once they have started, they must be conducted in good faith. Negotiations in good faith require:

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<sup>243</sup> *German External Debt*, para 62.

<sup>244</sup> *North Sea Continental Shelf*, para 86.

<sup>245</sup> Hassan, p 479.

<sup>246</sup> *German External Debt*, para 62.

<sup>247</sup> Thirlway, p 23.

<sup>248</sup> Wellens, p 38.

<sup>249</sup> *Ibid*, p 28; Peters, pp 15-16; Hutchison, pp 151-153.

- i. conducting them without engaging in fraudulent, corruptive, or coercive conduct (VCLT Article 49-52);<sup>250</sup>
- ii. refraining from acts which would frustrate the purposes of the negotiations;<sup>251</sup>
- iii. refraining from abuse of rights and conducting negotiations in a loyal and meaningful way and making genuine serious efforts<sup>252</sup> with a view to arriving at an agreement<sup>253</sup> and not merely going through a formal process,<sup>254</sup> i.e.
  - a. not asserting excessive claims by abusing a higher bargaining power;<sup>255</sup>
  - b. seriously considering other State's proposals/interests/rights;<sup>256</sup>
  - c. compromising, i.e. making mutual concessions;<sup>257</sup>
  - d. not hiding behind equivocal formulations in order later to benefit from the text's ambiguity;<sup>258</sup>
  - e. avoiding causing disproportionate inconveniences and harm to the other State;<sup>259</sup>
  - f. not obstructing negotiations, e.g. by interrupting communications or causing delays in an unjustified manner or disregarding the procedures agreed upon;<sup>260</sup>
  - g. not exercising discretion arbitrarily;<sup>261</sup>
  - h. avoiding movements and reversals of positions;<sup>262</sup>
  - i. not abandoning the process prematurely;<sup>263</sup>
- iv. furthering negotiations in case of deadlock.<sup>264</sup>

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<sup>250</sup> See also Hassan, p 478.

<sup>251</sup> Wellens, pp 45-46; Hassan, p 449.

<sup>252</sup> See also Hutchison, pp 119, 129, 141, 153.

<sup>253</sup> See also Hutchison, p 134; Wellens, pp 28-29, 31; Peters, p 9.

<sup>254</sup> *North Sea Continental Shelf*, para 85(a); *Lake Lanoux*, para 22.

<sup>255</sup> *North Sea Continental Shelf*, para 85(a). See also Hassan, p 477.

<sup>256</sup> *Lake Lanoux*, para 22; *Fisheries Jurisdiction*, paras 71, 78-79. See also Hassan, pp 476-477; Hutchison, p 153.

<sup>257</sup> *Railway Traffic*, pp 115-116; *North Sea Continental Shelf*, para 85(a); *Gulf of Maine*, paras 87 and 112(1); *German External Debts*, para 62; UNGA Res 37/10, Peaceful Settlement of Disputes between States (15 November 1982) UN Doc A/RES/37/10, para 5. See also Hassan, p 479; Wellens, p 45; Peters, p 16; Hutchison, p 153; Ziegler and Baumgartner in Mitchell et al., p 19.

<sup>258</sup> Wellens, p 46.

<sup>259</sup> For example '[m]aking "acceptance of an agreement contingent upon some change in the behaviour of the other parties with regard to issues having no direct bearing on the negotiations"' See Wellens, p 43. See also Hassan, p 447.

<sup>260</sup> *Lake Lanoux*, para 11.

<sup>261</sup> Hassan, p 448.

<sup>262</sup> Wellens, p 45.

<sup>263</sup> *Mavrommatis*, p 13; Wellens, p 28; Peters, p 16.

<sup>264</sup> *North Sea Continental Shelf*, Separate Opinion of Judge Padillo Nervo, para 92. See also Hassan, p 480; UNGA Res 53/101 (20 January 1999) UN Doc A/RES/53/101 2(g).



In contrast to negotiations in the dispute settlement context where good faith requires resort to other means of settlement in case negotiations fail,<sup>265</sup> there is no real alternative means for norm-creation and the negotiating parties are rarely obligated to reach an agreement.

In conclusion, the author argues that States have an obligation to negotiate in good faith, whether the obligation to negotiate has a general international law or conventional basis or even if the negotiations have been undertaken voluntarily. Hence, the sub-hypothesis that the obligation to negotiate in good faith is applicable to all negotiations between States is confirmed. The content of the obligation to negotiate in good faith varies depending on the circumstances of each case and has been exemplified above by reference to international jurisprudence and academic literature. A breach of the obligation to negotiate in good faith entails legal consequences as outlined and discussed in chapter 3 of the master thesis.

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<sup>265</sup> UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/25/2625, para 3; UNGA Res 37/10, Peaceful Settlement of Disputes between States (15 November 1982) UN Doc A/RES/37/10; *Gabčíkovo-Nagymaros Project*; para 143. See also Wellens, p 28; Peters, p 16; Hutchison, pp 145-146, 153.

## 2 OBLIGATION TO NEGOTIATE IN GOOD FAITH AS A GENERAL PRINCIPLE OF LAW RECOGNISED BY CIVILISED NATIONS

This chapter of the master thesis aims to complete the analysis of international law and to establish whether the obligation to negotiate in good faith derives from domestic legal systems as a general principle of law recognised by civilised<sup>266</sup> nations. M. A. Rogoff suggests that the international application of the doctrine of pre-contractual liability/*culpa in contrahendo* is supported as the doctrine is recognised in many domestic legal systems as a general principle of law.<sup>267</sup>

The different sets of international and regional model rules, although not binding, such as the UNIDROIT Principles on International Commercial Contracts (PICC),<sup>268</sup> the Principles of European Contract Law (PECL),<sup>269</sup> and the Draft Common Frame of Reference (DCFR)<sup>270</sup> aiming to bring out the common core and to harmonise the law on commercial contracts seem to support M. A. Rogoff's position. However, there appears to be a civil law and common law divide, which is also apparent from the preparatory works of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>271</sup>

Thus, a closer inspection of the domestic laws is warranted and a comparative analysis of the regulation of pre-contractual liability in the civil law and common law undertaken. It will be argued that, in general, both civil and common law legal systems – English law somewhat more reluctantly<sup>272</sup> and Australian law a bit hesitantly – recognise the principle of good faith contractual performance.<sup>273</sup> However, in contrast to civil law, common law shows reluctance

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<sup>266</sup> According to H. Thirlway it is an open term subject to fluctuation, and according to A. Pellet all states are considered 'civilised nations'. See Thirlway, pp 243-244; A. Pellet in A. Zimmermann et al. (Eds). *The Statute of the International Court of Justice: A Commentary*. Oxford: Oxford University Press 2006, ICJ Statute Article 38/256. G. Bücheler suggests speaking of 'general principles of law "common to the major legal systems of the world"'. See G. Bücheler. *Proportionality in Investor-State Arbitration*. Oxford: Oxford University Press 2015, p 51. The academic exercise of deriving a principle of law from the domestic laws of the sample States in the following subsections of this chapter should in no way be understood as imposing these mostly western States' approaches to others.

<sup>267</sup> Rogoff, pp 146-147.

<sup>268</sup> UNIDROIT Principles of International Commercial Contracts 2010, UNIDROIT 2010. – <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (17 April 2016).

<sup>269</sup> Commission on European Contract Law. *The Principles of European Contract Law*. – <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/> (17 March 2016).

<sup>270</sup> The Study Group on a European Civil Code, *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (2009). – [http://ec.europa.eu/justice/policies/civil/docs/defr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/defr_outline_edition_en.pdf) (17 March 2016).

<sup>271</sup> United Nations Convention on Contracts for the International Sale of Goods. – RT II 1993, 21, 52.

<sup>272</sup> R. Brownsword. *Contract Law. Themes for the Twenty-First Century*. 2<sup>nd</sup> ed. New York: Oxford University Press 2006, p 111.

<sup>273</sup> See N. E. Nedzel. *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*. – *Tulane European & Civil Law Forum* 1997/12, p 98. See also O'Connor, p 41.

to recognise a general pre-contractual duty of good faith absent an express and clear agreement between the parties to that regard.

## 2.1 Nature and Derivation of General Principles of Law

There is some debate whether Article 38(1)(c) includes general principles of international law, principles applicable to all legal systems, and principles of legal logic or whether they just reflect customary international or treaty law.<sup>274</sup> For example, the ICJ has used Article 38(1)(c) of the ICJ Statute and referred among others to principles of estoppel or acquiescence, abuse of rights, and good faith,<sup>275</sup> which can rather be classified as general principles of international law. The ICJ has based no decisions explicitly upon Article 38(1)(c) of the ICJ Statute.<sup>276</sup> Similarly to A. Pellet, the author restricts the scope of Article 38(1)(c) to principles emanating from domestic law for the purposes of this master thesis.<sup>277</sup>

According to L. F. L. Oppenheim '[t]he intention is to authorise the Court to apply the general principles of municipal jurisprudence, [in particular of private law], insofar as they are applicable to relations of States'.<sup>278</sup> Thus, identifying such general principles of law involves 1) a comparative study of national legal systems and 2) demonstrating that the relevant principle is transposable to the international level.<sup>279</sup> Elements of other developed systems are chosen, modified, and adapted by international tribunals resulting in a body of international law of its own creation though influenced by domestic law.<sup>280</sup> As such, the general principle of law is not only a 'subsidiary' source of law, a term confined to Article 38(1)(d).<sup>281</sup>

The relevance of a general principle is that 1) it may fill *lacunae* in case a treaty or customary rule does not regulate an issue that is crucial for deciding a case;<sup>282</sup> and 2) general principles provide guidance for the meaning of treaty stipulations that are textually open to different interpretations or can qualify relevant rules of international law.<sup>283</sup> It is established above in subsection 1.2 that treaty law regulates the negotiation stage only to a limited extent. In

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<sup>274</sup> Bücheler, pp 31-32.

<sup>275</sup> Brownlie, p 36.

<sup>276</sup> Thirlway, pp 232, 236, 1201.

<sup>277</sup> Pellet in Zimmermann et al., ICJ Statute Article 38/252-255. See also section 1.1 above.

<sup>278</sup> R. Jennings and A. Watts. Oppenheim's International Law. 9<sup>th</sup> ed. Vol 1. Peace. Introduction and Part I. London and New York: Longman 1996, § 12, pp 36-37; Brownlie, pp 34-35. See also Thirlway, pp 235, 239.

<sup>279</sup> Pellet in Zimmermann et al., ICJ Statute Article 38/258, 264. See also Bücheler, pp 32-33.

<sup>280</sup> Brownlie, p 35.

<sup>281</sup> Jennings and Watts, § 12, p 40; Brownlie, p 34.

<sup>282</sup> E.g. *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain)*, Judgment, 5 February 1970, ICJ Reports 1970, p 3 (hereinafter *Barcelona Traction*), para 50. See also Thirlway, pp 233, 1201.

<sup>283</sup> Article 31(3)(c) VCLT; Kolb, pp 32-33; Bücheler, p 81.

section 1.3 the author of the master thesis argues that the obligation to negotiate in good faith is of customary international law status. The national laws of States as evidence of state practice and *opinio juris* could further support this conclusion. In addition, the analysis provides an interesting and useful comparison point with regard to the content of the obligation to negotiate in good faith at domestic and international level.

Concerning transposability to the international level, the obligation to negotiate treaties in good faith, in essence, falls into the realm of treaty law. The provisions of the VCLT on an error, fraud, and coercion of a state representative are inspired by domestic private laws, in particular, law of obligation and/or contract law. Thus, the analogy is plausible also regarding the obligation to negotiate in good faith. '[T]he relationship between equal and independent private actors might offer the most appropriate analogies for the relationships between sovereign States.'<sup>284</sup> Nevertheless, the author acknowledges that general principles of law can only be identified at a high level of abstraction since the process of concluding international treaties is subject to a high standard of care and deliberation and differs from circumstances pertaining to the conclusion of private law contracts.<sup>285</sup>

With regard to the comparative study of national legal systems, in order to become a general principle of law, good faith and the obligation to negotiate in good faith must have a normative basis.<sup>286</sup> As Article 38(1)(c) of the ICJ Statute does not require recognition by all domestic legal orders, an analysis of a fair number of representative legal systems is sufficient.<sup>287</sup> For the purposes of the master thesis, the normative basis is sought from the largest and most influential legal traditions, i.e. the civil law tradition and the common law tradition.<sup>288</sup> Such division is also the basis for works of comparative contract law.<sup>289</sup> The master thesis deals with comparative law on a micro level, i.e. compares specific legal norms regarding good faith and, in particular, the obligation to negotiate in good faith in legal systems.<sup>290</sup>

Sample representative States are chosen based on K. Zweigert and H. Kötz's macro level comparative law division of legal families: 1) Romanistic family, 2) Germanic family, 3)

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<sup>284</sup> Bücheler, p 33.

<sup>285</sup> See also Rensmann in Dörr and Schmalenbach, Article 48/3.

<sup>286</sup> B. M. Cremades. Good Faith in International Arbitration. – American University International Law Review 2012/27(4), p 768.

<sup>287</sup> Pellet in Zimmermann et al., ICJ Statute Article 38/258; Thirlway, p 239.

<sup>288</sup> Merryman and Pérez-Perdomo, pp 1-5.

<sup>289</sup> B. Fauvarque-Cosson and D. Mazeaud (Ed). European Contract Law Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules. Association Henri Capitant, Société de législation comparée. Munich: Sellier. European Law Publishers 2008. See also Cremades, p 770; Quagliato, p 215.

<sup>290</sup> See J. Husa. Legal Families in J. M. Smits (Ed). Elgar Encyclopedia of Comparative Law. 2<sup>nd</sup> ed. Cheltenham: Edward Elgar 2012.

Nordic family, 4) Common law family, and 5) others, such as Chinese law, Japanese law, Islamic Law, and Hindu Law.<sup>291</sup> However, the author does not analyse the Nordic family separately, and as the contract law of the ‘other’ families is highly influenced by the contract laws of the former families, these are largely left out from the analysis. A. Pellet has opined that probably all modern domestic laws borrow part of their rules from civil law and common law and that it is ‘enough to ascertain that such principles are present in any (or some) of the laws belonging to these various systems’.<sup>292</sup>

In the civil law tradition, the most important and influential legal system in the Germanic family, in particular with regard to the principle of good faith, is Germany, and in the Romanistic family – France.<sup>293</sup> The Netherlands is also an important example illustrating a shift away from the French influence to German influence regarding good faith.<sup>294</sup> Additional remarks are made with regard to other legal systems in these families, including outside Europe. In the common law family, English law must be differentiated from the law of the US, Australia and Canada adopting intermediate positions.

An adequate verification of general principles of law recognised by civilised nations requires taking into account both legislative provisions and domestic case law.<sup>295</sup> It is a difficult task and cannot be exhaustive due to the limits of the master thesis. Therefore, for generalisations, the author additionally relies on secondary literature. As far as possible, the author aims to limit the focus of this subsection to obligations going beyond the prohibitions of fraud, corruption, and coercion in the negotiation process as clearly recognised in Articles 49-52 of the VCLT and which, as T. Rensmann suggests, are expressions of general principles of law recognised by civilised nations.<sup>296</sup>

In general, while good faith is a vague notion also in the domestic laws of States,<sup>297</sup> it has three types of meaning: 1) good faith as criteria of interpretation, 2) good faith as a standard of behaviour creating legal obligations, and 3) good faith as a protection mechanism against mistaken belief.<sup>298</sup> The master thesis is concerned with good faith as a standard of behaviour,

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<sup>291</sup> Zweigert and Kötz, p 73.

<sup>292</sup> Pellet in Zimmermann et al., ICJ Statute Article 38/258.

<sup>293</sup> See also S. Whittaker and R. Zimmermann. Good Faith in European Contract Law: Surveying the Legal Landscape in S. Whittaker and R. Zimmermann. Good Faith in European Contract Law. Cambridge: Cambridge University Press 2000, p 48.

<sup>294</sup> *Ibid*, pp 53-54.

<sup>295</sup> Verhoeven in Cannizzaro, p 298.

<sup>296</sup> Rensmann in Dörr and Schmalenbach, VCLT Article 49/5, 12, 37, Article 50/17, Article 51/2. Coercion in Article 52 of the VCLT reflects customary international law. See Rensmann in Dörr and Schmalenbach, VCLT Article 52/53. See also subsection 1.2 above.

<sup>297</sup> Fauvarque-Cosson and Mazeaud, p 150, 156 ff, p 181.

<sup>298</sup> See Fauvarque-Cosson and Mazeaud, p 162.

i.e. ‘to behave loyally, sincerely, honestly; to keep one’s word; to keep one’s promise’,<sup>299</sup> in particular, in the conclusion of a contract.

## 2.2 Model Rules v CISG

The non-binding model rules in PICC and PECL and the DCFR all provide for pre-contractual duties of good faith. Article 1.7 of the PICC provides that ‘[e]ach party must act in accordance with good faith and fair dealing in international trade.’ Article 2.1.15 of the PICC prohibits negotiations in bad faith and provides that

- (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
- (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

Article 2:301 (ex art. 5:301) of the PECL<sup>300</sup> and Section 2 Article 3:201 of the DCFR state the same as Article 2.1.15 of the PICC, albeit in a slightly different wording. Each also provides for a duty of confidentiality:

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.<sup>301</sup>

PECL Article 4:106 regulates liability for providing incorrect information and DCFR Section II Article 7:205 and Section VI Article 2:210, PECL Article 4:107, and PICC Article 3.2.5 for fraudulent non-disclosure of information.

PECL was inspired by the CISG which by now has 84 parties to it. CISG, however, makes little reference to good faith in Article 7(1): ‘[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade’, and does not contain a provision on good faith negotiations. Thus, good faith needs to be observed in international commerce but does not necessarily have to govern sale and purchase.<sup>302</sup> However, the

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<sup>299</sup> Whittaker and Zimmermann, p 30; Fauvarque-Cosson and Mazeaud, p 163.

<sup>300</sup> In PECL good faith is coupled with reasonableness (Article 1:302) and restricts the freedom of contract (Article 1:102(1)). The French language versions of PECL and PICC include only ‘good faith’, which, however, needs to be understood in the wider English meaning, ie fair dealing referring to the objective good faith. See Fauvarque-Cosson and Mazeaud, pp 173-174, 515-516.

<sup>301</sup> PICC Article 2.1.16. See also PECL Article 2:302 and Section 2 Article 3:302.

<sup>302</sup> Cremades, p 782.

principle of good faith is manifested for example in CISG Article 8(2) regarding the reasonable person standard, Article 16(2)(b) concerning irrevocability of an offer in cases of reasonable reliance, which is of relevance to the pre-contractual stage, and Article 21(2) regarding the status of a timely dispatched acceptance that was received late.<sup>303</sup> Despite varying interpretations, it is suggested that good faith is an underlying principle of the CISG.<sup>304</sup>

In contrast to the model rules, CISG does not provide for pre-contractual duties of good faith. The draft Article 5 of CISG, which provided that '[i]n the course of the formation of the contract the parties must observe the principle of fair dealing', was omitted in the final agreement as a compromise solution to resolve differences between the common law and civil law jurists regarding good faith.<sup>305</sup> The proposal by the German Democratic Republic that the Convention provide for pre-contractual liability was rejected for the same reason.<sup>306</sup> Therefore, the author of the master thesis finds it necessary to obtain a better understanding of the civil and common law approaches to good faith and the obligation to negotiate in good faith in order to establish whether the obligation to negotiate in good faith could be part of international law as a general principle of law recognised by civilised nations.

## 2.3 Civil Law Tradition

In the civil law legal tradition, the general principle of good faith and the obligation to perform the contract in good faith are generally recognised. Nevertheless, good faith as a standard of behaviour is difficult to define and its application depends on the context of a particular case.<sup>307</sup> In general, good faith behaviour includes duties of loyalty and honesty, cooperation and disclosure, and duties to consider the legitimate interests and rights of the other party.<sup>308</sup>

Based on the principle of good faith, the civil law legal tradition also recognises the concept of pre-contractual liability.<sup>309</sup> It has its roots in Roman law<sup>310</sup> and was articulated as the

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<sup>303</sup> See also N. Hofmann. Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe. – Pace International Law Review 2010/22, p 165.

<sup>304</sup> Fauvarque-Cosson and Mazeaud, pp 168-169, 532.

<sup>305</sup> *Ibid*, pp 168, 531-532; Quagliato, pp 219-220; Cremades, p 782.

<sup>306</sup> D. Sim. The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods. Pace Law School CISG Database 2001. – [http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#\\*](http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#*) (17.02.2016), at 3(A)3.b).

<sup>307</sup> I. Kull in P. Varul et al. (Eds). *Võlaõigusseadus I. Üldosa. (§§1-207). Kommenteeritud väljaanne. [Law of Obligations Act I. General Part (§§1-207). Comm. Ed.]* Tallinn: Juura 2006, LOA § 6/4.1.

<sup>308</sup> Kull in Varul et al., LOA § 6/4.1, 4.2.2.c).

<sup>309</sup> F. Kessler and E. Fine. *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study.* – Harvard Law Review 1964/77(3), p 407; J. Cartwright and M. Hesselink (Eds).

doctrine of *culpa in contrahendo* ('fault in negotiating') by I. von Jhering.<sup>311</sup> I. von Jhering advanced the thesis that a negotiating party must be compensated for his or her reliance damages by the party whose culpable conduct during contract negotiations caused the contract's invalidity or prevented its perfection.<sup>312</sup> I. von Jhering's theory aimed to protect the negotiating party from mistake; it was R. Saleilles who advanced the theory to cover failed negotiations.<sup>313</sup> I. von Jhering's ideas influenced many civil law systems, in particular, the German legal system.<sup>314</sup>

### 2.3.1 German Law

The principle of good faith ('*Treu und Glauben*') is enshrined in Article 242 of the *Bürgerliches Gesetzbuch* (BGB)<sup>315</sup> requiring good faith performance of contractual obligations. Together with the principal obligations of any contract, the German jurist introduced so-called accessory obligations such as the duties of vigilance, loyalty and cooperation, and obligations to clarify and inform.<sup>316</sup> *Culpa in contrahendo* extends these ancillary duties into the pre-contractual area.<sup>317</sup> It entered the modern German law under cover of fictitious pre-contractual contracts, later, on the basis of a general analogy to Articles 122, 179, and 307, 309 BGB.<sup>318</sup>

The concept of *culpa in contrahendo* can also be seen as advanced by the German judiciary on the basis of Article 242 of the BGB,<sup>319</sup> imposing by virtue of law on negotiating parties duties of protection and loyalty, which only in 2001 with the insertion of Article 311 found its

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Precontractual Liability in European Private Law. Cambridge: Cambridge University Press 2009, p 485; Nedzel, p 98.

<sup>310</sup> For more details see M. J. Schermaier. *Bona Fides* in Roman Contract Law in Zimmermann and Whittaker, pp 63-92; Fauvarque-Cosson and Mazeaud, pp 151-153.

<sup>311</sup> I. von Jhering. *Culpa in contrahendo* oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen. – *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1861/4. See Kessler and Fine, pp 401-403; S. A. Mirmina. *A Comparative Survey of Culpa in Contrahendo, Focusing on Its Origins in Roman, German, and French Law As Well As Its Application in American Law.* – *Connecticut Journal of International Law* 1992/8, pp 79, 81; Cartwright and Hesselink, pp 32-33; Fauvarque-Cosson and Mazeaud, p 520.

<sup>312</sup> Kessler and Fine, p 401; Mirmina, p 79; Fauvarque-Cosson and Mazeaud, p 185.

<sup>313</sup> R. Saleilles. *De la Responsabilité Précontractuelle.* – *Revue Trimestrielle de Droit Civil* 1907/6, pp 697, 718-9, 722 as referred to in E. A. Farnsworth. *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations.* – *Columbia Law Review* 1987/87(2), p 240.

<sup>314</sup> Kessler and Fine, p 403.

<sup>315</sup> German Civil Code. – [http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/) (17 April 2016).

<sup>316</sup> Cremades, pp 773-774.

<sup>317</sup> Whittaker and Zimmermann, p 27.

<sup>318</sup> *Ibid.*

<sup>319</sup> Kessler and Fine, p 404; Cremades, p 766; Whittaker and Zimmermann, p 27.



place in the German BGB.<sup>320</sup> Article 311 BGB together with Article 241(2) BGB now provides that the obligation to take account of the rights, legal interests, and other interests of the other party comes into existence by the commencement of contract negotiations and the initiation of a contract.

Interestingly, the provisions do not use the terminology of ‘good faith’.<sup>321</sup> The statutory provisions must be construed with reference to the preceding case law.<sup>322</sup> The negotiating parties are under no duty to reach an agreement.<sup>323</sup> However, if negotiations are entered into or continued without the intention to reach an agreement or without the other party having a chance to bargain, the party is in breach of the duty to negotiate in good faith.<sup>324</sup> Similarly, unjustified breaking off of negotiations where the other party legitimately expected the contract to be perfected breaches the duty to negotiate in good faith.<sup>325</sup>

Furthermore, the duty to negotiate in good faith imposes upon the negotiating parties duties to provide accurate information and disclose information regarding matters of essential interest to the other negotiating party whom the non-disclosing party knows is not able to procure the information him or herself.<sup>326</sup> Some pre-contractual duties may be established during negotiations, such as an obligation to maintain the confidentiality of certain information or an obligation to restrain from negotiating with a third party for a specific length of time.<sup>327</sup> The injured negotiating party must be compensated for the damages incurred in reliance on the expected contract (reliance damages).<sup>328</sup>

### 2.3.2 French Law

In France, however, there has been a strong emphasis on the freedom of contract.<sup>329</sup> R. Saleilles advanced the view that negotiating parties must act in good faith and refrain from breaking off negotiations arbitrarily without compensating the other for reliance damages.<sup>330</sup> Nevertheless, until recently there appeared to be no direct French counterpart for the German

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<sup>320</sup> Cartwright and Hesselink, pp 33-34, 452; V. Monsalve-Caballero. The Legal and Historical Panorama of Culpa in Contrahendo at Contractual Negotiations. An Approach from European and Latin American Law. – Revista de Derecho, Universidad del Norte 2013/39, pp 132, 134-138, Fauvarque-Cosson and Mazeaud, p 520.

<sup>321</sup> See also Fauvarque-Cosson and Mazeaud, p 186.

<sup>322</sup> Cartwright and Hesselink, p 34.

<sup>323</sup> *Ibid*; Quagliato, p 216.

<sup>324</sup> Kessler and Fine, p 404; Cartwright and Hesselink, p 35; Quagliato, p 216.

<sup>325</sup> Kessler and Fine, p 404; Cartwright and Hesselink, p 35.

<sup>326</sup> Kessler and Fine, pp 404-405.

<sup>327</sup> Quagliato, p 216.

<sup>328</sup> Kessler and Fine, p 405; Cartwright and Hesselink, p 36.

<sup>329</sup> Whittaker and Zimmermann, p 33. As opposed to Germany, offers are revocable in France. See Mirmina, p 87.

<sup>330</sup> Saleilles, pp 697, 718-9, 722 as referred to in Farnsworth 1987, p 240.

*culpa in contrahendo*. Article 1134(3) of the French Civil Code<sup>331</sup> only recognises a duty to perform contracts in good faith.

The ordinance of 10 February 2016,<sup>332</sup> which will become effective 1 October 2016, provides in the new Article 1104 that '[c]ontracts must be negotiated, formed and performed in good faith' and specifies that this provision is a 'public policy provision'.<sup>333</sup> Article 1112 further specifies that '[a]ny party that conducts or terminates such negotiations wrongfully shall be obliged to provide compensation on the basis of extra-contractual liability'.<sup>334</sup> In addition, pursuant to the new Article 1112-1 of the French Civil Code: '[i]f one of the parties knows information which is of decisive importance for the consent of the other party, he must inform him thereof wherever it is legitimate that the other party does not know the information or relies on his contracting party'.<sup>335</sup>

These amendments seem to merely codify the current State of French law.<sup>336</sup> Pre-contractual liability has been long recognised by the French judiciary. In *Société Muroiterie Fraisse v Micon et Autres* a French Court of Appeals noted:

[I]t must be recognized. . . that the preliminary phase of negotiations, during which the conditions of the contemplated contract are studied and discussed, certain obligations of rectitude and good faith rest on the parties; these obligations clearly relate not to the conclusion eventual contract but to the conduct of negotiation themselves.<sup>337</sup>

The basis for pre-contractual liability is general tortious liability for fault in Articles 1382 and 1383 of the French Civil Code.<sup>338</sup> Thereby French law reinforces the ideas of the abuse of rights and of contractual good faith at the stage of negotiations.<sup>339</sup> In order to establish

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<sup>331</sup> French Code civil. <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20160413> (13 April 2016).

<sup>332</sup> Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations. <https://www.legifrance.gouv.fr/eli/ordonnance/2016/2/10/JUSC1522466R/jo/texte> (13 April 2016).

<sup>333</sup> J.-L. Soulier. Ordinance of February 10, 2016 for the Reform of French Contract Law: The Principle of the Binding Force of Contracts is Considerably Undermined by the New Provisions of the French Civil Code. – <http://www.soulier-avocats.com/en/blog/ordonnance-of-february-10-2016-for-the-reform-of-french-contract-law-the-principle-of-the-binding-force-of-contracts-is-considerably-undermined-by-the-new-provisions-of-the-french-civil-code/> (26 March 2016).

<sup>334</sup> P. Coshier. New Developments in the Impending Reform of French Contract Law. – International Business Law Journal 2015/6, p 491.

<sup>335</sup> Soulier.

<sup>336</sup> Coshier, pp 491, 49; C. Pédamon. Freedom of Contract and Contractual Justice: the Foundations of the French Reform of Contract Law. – Company Law 2016/37(2), pp 53-54.

<sup>337</sup> Court of Appeal Pau. 1969 dalo et Sirey 716, 14 January 1969 in Quagliato, p 216.

<sup>338</sup> Kessler and Fine, p 407; Mirmina, p 87; Nedzel, pp 114-115; Monsalve-Caballero, pp 139-140; Cartwright and Hesselink, pp 28, 458.

<sup>339</sup> Whittaker and Zimmermann, p 35.

liability, faulty conduct must have caused harm.<sup>340</sup> The content of such pre-contractual liability is similar to the German *culpa in contrahendo*. It is wrongful to enter into or continue negotiations without a real intention to reach an agreement, to make misrepresentations, to leak confidential information, and to break off negotiations unexpectedly without a legitimate reason<sup>341, 342</sup>. In addition, the duty of good faith imposes upon the negotiating parties extensive informational obligations.<sup>343</sup> So far when the loss is certain, the wronged party is not only to be compensated fully for his or her reliance loss and loss of opportunity but also for wrong caused to reputation or loss caused by divulging confidential information.<sup>344</sup>

### 2.3.3 Dutch Law

The Dutch approach illustrates a shift away from the French model. In its Article 1374, the old *Burgerlijk Wetboek* (BW) used to contain a good faith provision that was based on Article 1134 of the French Civil Code and, like its French model, was for a long time not accorded much practical significance. After the First World War, the importance of its application grew comparable to Article 242 of the BGB. The new BW of 1992<sup>345</sup> includes numerous provisions of good faith in Articles 6:248, 6:258, 6:2;<sup>346</sup> however, substituting good faith with the expression of ‘reasonableness and fairness’.<sup>347</sup> There is no provision on *culpa in contrahendo* but the doctrine has been developed in court practice and differs somewhat from the German and French approaches.

In *Baris/Riezenkamp*,<sup>348</sup> the Hoge Raad ruled that the legal relationship of negotiating parties was dominated by good faith requiring taking into account each other’s interests. In *Plas/Valburg*,<sup>349</sup> the Hoge Raad further distinguished three stages in the negotiating process. At the first stage, no limitations apply to breaking off negotiations and at the second stage,

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<sup>340</sup> Cartwright and Hesselink, p 28.

<sup>341</sup> E.g. Court of Cassation, Commercial Division. No 00-10.243 00-10.949, 26 November 2003. – [https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007049778&dateTexte=](https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007049778&dateTexte= (28 April 2016).) (28 April 2016).

<sup>342</sup> Nedzel, p 115; Cartwright and Hesselink, p 29.

<sup>343</sup> M. van Rossum. The Duty of Disclosure: Tendencies in French Law, Dutch Law and English Law; Criteria, Differences and Similarities Between the Legal Systems. – Maastricht Journal of European & Comparative Law 2000/7, pp 301-304.

<sup>344</sup> Cartwright and Hesselink, pp 29-31.

<sup>345</sup> Dutch Civil Code. – <http://www.dutchcivillaw.com/civilcodegeneral.htm> (17 April 2016).

<sup>346</sup> Whittaker and Zimmermann, pp 53-54.

<sup>347</sup> ‘Reasonableness and equity’ as translated in Fauvarque-Cosson and Mazeaud, pp 154, 524. The terminological difference aims to avoid confusion with subjective good faith (BW Article 3:11). In this sense, the terms of good faith, fair dealing, reasonableness and equity can be seen as synonymous. Fauvarque-Cosson and Mazeaud, p 524.

<sup>348</sup> HR 15 November 1957. NJ 1958/67.

<sup>349</sup> HR 18 June 1982. NJ 1983/723.

the party breaking off negotiations has to compensate the other party's expenses. At the third stage, where it is reasonable to rely upon a contract coming into existence, the party breaking off negotiations is liable in damages up to expectation interest and may even be ordered to continue negotiations.<sup>350</sup> In *De Ruiterij/Ruiters*,<sup>351</sup> the Hoge Raad has limited the latter doctrine yet the principle at its extreme has been repeated.<sup>352</sup> In *CBB/JPO*,<sup>353</sup> the Hoge Raad recognised the parties' freedom to break off negotiations, unless breaking off would be unacceptable in the specific circumstances of the case, and has created some uncertainty with regard to the doctrine.<sup>354</sup>

The pre-contractual duty of information in Dutch law is based on the provisions of mistake.<sup>355</sup> In addition, in *Cattier v Waanders* the Hoge Raad held that the duty of disclosure may also be infringed when a party has acted contrary to good faith.<sup>356</sup> Furthermore, as established in *Van der Beek v Van Dartel*, the duty of disclosure in principle prevails over a duty to investigate for yourself.<sup>357</sup>

Based on these sample States representative of the civil law legal tradition, the *culpa in contrahendo* doctrine requiring the parties to negotiate in good faith is generally recognised in the European civil law tradition, although the theoretical basis or range of application might differ.<sup>358</sup> The content of pre-contractual duties is similar among these legal systems imposing upon the parties extensive informational duties, prohibiting engaging in and continuing negotiations without a real intention to reach an agreement, and breaking off negotiations without a just cause.<sup>359</sup> Damages are traditionally awarded at least for reliance loss, i.e. negotiation expenses that were rendered futile, and loss of opportunity.<sup>360</sup> The Dutch approach to pre-contractual liability, influenced by both the French and German approaches, however, is rather extreme by its willingness to award expectation damages.

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<sup>350</sup> Cartwright and Hesselink, p 47.

<sup>351</sup> HR 14 June 1996. NJ 1997/481.

<sup>352</sup> See, e.g. HR 24 November 1995. NJ 1996/162. However, there have not been many cases where expectation damages have been awarded. See Cartwright and Hesselink, p 49.

<sup>353</sup> HR 12 August 2005. NJ 2005/467.

<sup>354</sup> Cartwright and Hesselink, pp 49-50.

<sup>355</sup> M. W. Hesselink. The Concept of Good Faith in A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak and C. E. du Perron (Eds). Towards a European Civil Code. 4<sup>th</sup> ed. The Netherlands: Kluwer Law International 2010, p 647, note 146.

<sup>356</sup> HR 2 April 1993. NJ 1995/ 94.

<sup>357</sup> HR 30 November 1973. NJ 1974/97. See also HR 21 December 1990. NJ 1991/251; Rossum, pp 304-306.

<sup>358</sup> Kessler and Fine, p 407; Cartwright and Hesselink, p 485; Cremades, p 777.

<sup>359</sup> See also Cremades, p 777.

<sup>360</sup> See also Cartwright and Hesselink, p 468; Cremades, p 777.

### 2.3.4 Other Legal Systems of the Civil Law

The German and French approaches have been influential worldwide. Yet, the legal adoption of the doctrine is a rather recent development<sup>361</sup> and an ongoing process. German BGB has, among others, influenced the Estonian law of obligations. Article 14 of the Estonian Law of Obligations Act is modelled upon PICC and PECL and is much more specific than the relevant provisions of the German BGB.<sup>362</sup> Nevertheless, its content reflects the doctrine of *culpa in contrahendo* as developed in German case law. Specific provisions on *culpa in contrahendo* can also be found, for example, in Articles 197 and 198 of the Greek Civil Code, Articles 1337 and 1338 Italian Civil Code, and Article 227 of the Portuguese Civil Code.<sup>363</sup>

Austria and Switzerland, on the other hand, are examples of legal systems expressly recognising the principle of good faith but having no specific provision on pre-contractual liability. The doctrine has been implied from some other provisions of contract law or law of obligations and has, thus, found judicial and doctrinal support.<sup>364</sup> Similarly, there is no specific legal provision in Denmark, Sweden or Norway, where the concept has found support through general principles of law; the courts of Denmark, however, being rather reluctant to award damages.<sup>365</sup> Spain, recognising the principle of good faith in Article 7 of its Civil Code, follows the French tortious liability approach based on Article 1902 of its Civil Code.<sup>366</sup> While the *culpa in contrahendo* doctrine in Finland derives from German contract law, it is being applied independently as tortious liability providing compensation for reliance loss and loss of opportunity.<sup>367</sup>

The influence of the German and French legal systems is evident also outside Europe. The Latin-American countries belong also to the civil law tradition and some of them have included the *culpa in contrahendo* doctrine in their legislation.<sup>368</sup> For example, Article 422 of the Brazilian Civil Code provides that ‘the parties are obliged to keep in the contract conclusion as well as in its execution, the principles of honesty and good faith’.<sup>369</sup> Article 863 of the Colombian Commercial Code and Articles 689-690 of the Paraguayan Civil Code transcribe classical statements of the doctrine, while Article 465 of the Bolivian Civil Code

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<sup>361</sup> See also Monsalve-Caballero, p 132.

<sup>362</sup> Võlaõigusseadus (Law of Obligations Act). – RT I, 11.03.2016, 2.

<sup>363</sup> See also Cartwright and Hesselink, pp 37-42, 44-46, 51-52, 60-61; Monsalve-Caballero, pp 132-138.

<sup>364</sup> Cartwright and Hesselink, pp 21-23; 56-61; Kessler and Fine, p 407; Monsalve-Caballero, p 138; Fauvarque-Cosson and Mazeaud, pp 520-521.

<sup>365</sup> Cartwright and Hesselink, pp 23-24, 50-51, 54-56, 61; Fauvarque-Cosson and Mazeaud, p 525.

<sup>366</sup> See also Cartwright and Hesselink, pp 53-54; Monsalve-Caballero, p 140.

<sup>367</sup> Cartwright and Hesselink, pp 25-27, 458.

<sup>368</sup> Monsalve-Caballero, p 143.

<sup>369</sup> Quagliato, p 217.

and Articles 990-993 of the reformed Argentinian Civil and Commercial Code contain precise rules on the topic. The Chilean approach by its lack of regulation and reliance on the general liability for fault bears resemblance to the French approach.<sup>370</sup>

Some of the major players, both economically and politically, on the international plane have only rather recently legally adopted the doctrine of *culpa in contrahendo*.

The legal system of China is based in the civil law tradition.<sup>371</sup> From its first major contract law, the 1978 Economic Contract Law, the principles of equity and mutual benefit during contracting have carried over to the Uniform Contract Law (UCL)<sup>372</sup> in effect from 1 October 1999, which is modelled upon UNIDROIT PICC, CISG, and foreign legal standards.<sup>373</sup> However, good faith dealings are inherent to the Chinese culture and good faith and thereby a prerequisite to a contractual relationship.<sup>374</sup> Article 42 of the UCL prohibits conducting negotiations in bad faith or with malicious intent and prevents concealment of important facts and presenting inaccurate information.<sup>375</sup> In order to abide by the principle of good faith, the parties have ‘to cooperate in forming and performing a contract in order to carry out its purpose’ and acknowledge that ‘a court has broad powers to fill gaps in the law, interpret contracts according to fairness principles, and override unfair provisions in the contract.’<sup>376</sup> Article 43 imposes upon the parties a duty of confidentiality. The injured party has to be compensated for reliance costs and costs for the loss of opportunity.<sup>377</sup>

In Russia Article 431.1 of the Civil Code<sup>378</sup> on pre-contractual negotiations only recently, on 1 June 2015, entered into force. The concept has so far been foreign to the Russian legal system and it remains to be seen how it will be applied by Russian courts.<sup>379</sup> The provision does not impose an obligation to reach an agreement but considers as bad faith conduct ‘providing the counterparty with incomplete or inaccurate information or non-disclosure of circumstances, which should have been brought to the attention of the counterparty’ and

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<sup>370</sup> Monsalve-Caballero, pp 143-145.

<sup>371</sup> J. H. Matheson. Convergence, Culture and Contract Law in China. – Minnesota Journal of International Law 2006/15(2), pp 334-335.

<sup>372</sup> Contract Law of the People's Republic of China. – [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383564.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm) (17 April 2016).

<sup>373</sup> Matheson, pp 335-336, 338, 344.

<sup>374</sup> *Ibid*, pp 344-345.

<sup>375</sup> *Ibid*, pp 346, 349; A. Godwin. Obligations to Negotiate in Good Faith in Cross-Border Deals. – Harvard Business Law Review Online 2013/3, pp 96-97.

<sup>376</sup> Matheson, p 346.

<sup>377</sup> Godwin, p 97.

<sup>378</sup> Russian Civil Code. – <http://www.wipo.int/wipolex/en/details.jsp?id=12785> (17 April 2016).

<sup>379</sup> T. Heidemann. Russian Civil Code reform - Aligning Russian contractual instruments with international practice (July 2015). – <http://www.cmslegal.ru/Russian-Civil-Code-reform---Aligning-Russian-contractual-instruments-with-international-practice-16-07-2015> (1 February 2016).

‘sudden and unjustified termination of negotiations under circumstances which the other party could not reasonably expect.’<sup>380</sup> It also imposes an obligation of confidentiality.<sup>381</sup> A negotiating party in breach of these obligations has to compensate the counterparty for reliance damages and loss of opportunity to conclude a contract with a third party.<sup>382</sup>

As illustrated above, the duty to negotiate in good faith has been generally recognised in the civil law tradition both in legal systems in Europe and outside Europe.

## 2.4 Common Law Tradition

The countries in the common law tradition are traditionally more reluctant to recognise a general principle of good faith underlying the concept of pre-contractual liability.<sup>383</sup> In common law, the freedom of contract strongly prevails – the negotiating parties are at arm’s length, i.e. independent and equal, and free to withdraw from negotiations at any time without incurring liability.<sup>384</sup> The principle of *caveat emptor* applies and negotiating parties are not obliged to disclose information but required to investigate themselves.<sup>385</sup> Absent a special relationship, no obligations are imposed upon the negotiating parties until a contract has been formed and is enforceable.

Contract formation elements in common law are offer, acceptance, consideration, parties’ intention to be bound, and certainty of contract terms. As a general rule, offers are revocable for lack of consideration and, thus, negotiating parties are free to withdraw from negotiations. Similarly, gratuitous promises are unenforceable for lack of consideration. Agreements to negotiate in good faith are often unenforceable due to lack of certainty.<sup>386</sup> In addition, it is often argued that civil law codifications focus more on the subjective expectations of the

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<sup>380</sup> Heidemann.

<sup>381</sup> Ibid.

<sup>382</sup> Ibid.

<sup>383</sup> E. A. Farnsworth. Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws. – Tulane Journal of International and Comparative Law 1995/3, p 57; A. F. Mason. Contract, Good Faith and Equitable Standards in Fair Dealing. – Law Quarterly Review 2000/116, pp 70-71; Zimmermann and Whittaker, pp 39-41; Cartwright and Hesselink, p 451; H. Beale. Chitty on Contracts. Vol I. General Principles. 32<sup>nd</sup> ed. UK: Sweet and Maxwell 2015 (hereinafter Chitty on Contracts 2015). See also Nedzel, p 98; Quagliato, p 217; Cremades, p 766; M. C. A. Fonseca. Negotiating in Good Faith: Only a Civil Law Obligation? A comparative view between English common law and Puerto Rico’s mixed legal system. Pangea 2013. – <http://pangeaupr.org/2013/12/10/negotiating-in-good-faith/> (17.02.2016), pp 8-9.

<sup>384</sup> Kessler and Fine, pp 407-409, 412; Farnsworth 1987, p 221; Cartwright and Hesselink, pp 451, 461; Mason, pp 70-71; Cremades, p 766.

<sup>385</sup> Rossum, pp 306-307.

<sup>386</sup> E.g. Walford v Miles. House of Lords, [1992] 2 AC 128 (HL), 23 January 1992, p 138 (Lord Ackner); Sax v Tchernoy. Queen’s Bench Division, [2014] EWHC 795 (Comm), 26 March 2014, para 67.

parties to a contract than common law, which adopts an objective literal approach to contracts, is accustomed to.<sup>387</sup>

As will be discussed below, English law has been the most conservative regarding recognition of a general principle of good faith and the duty to negotiate in good faith.<sup>388</sup> Other important common law jurisdictions, such as the USA, Australia, and Canada, are strongly influenced by English law. However, the US recognition of good faith performance is influenced by German law instead. After abolishing the right to appeal to the English Privy Council, the legal systems of Canada and Australia have developed more independently and adopt intermediary positions compared to English and US law. Nevertheless, good faith is not extended to contract negotiations in any of these legal systems lacking an express and clear agreement to that regard.

### 2.4.1 English Law

While good faith has played a role in an earlier stage of development of English law,<sup>389</sup> modern English law has not committed itself to an overriding principle of good faith and has denied the theory of the abuse of rights.<sup>390</sup> Although the CISG includes a compromise solution with regard to the principle of good faith, the United Kingdom is among the States that have not ratified it.<sup>391</sup> This exemplifies the reluctance of English law towards the recognition of a general principle of good faith. It is feared that the introduction of a general principle of good faith will create legal uncertainty, undermine the principle of contractual autonomy thereby reducing economic efficiency, and allow for unpredictable judicial discretion.<sup>392</sup> Rather than accepting a general doctrine of ‘good faith’, English law ‘has

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<sup>387</sup> Quagliato, p 215. *Contra* J. van Dunné. On a Clear Day, You Can See the Continent – the Shrouded Acceptance of Good Faith as a General Rule of Contract Law on the British Isles. – Construction Law Journal 2015/31(1), pp 6, 22.

<sup>388</sup> Whittaker and Zimmermann, p 39; J. Cartwright. The English Law of Contract: Time for Review? – European Review of Private Law 2009/17, p 156; Fonseca, pp 8-9.

<sup>389</sup> In 1766 in *Carter v Boehm*, in the context of insurance contracts, Lord Mansfield stated that ‘[t]he governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing to the contrary.’ See *Carter v Boehm*. Court of King’s Bench, [1766] 3 Burrow 1905 (KB), 1 January 1766, at 1910. In early 19<sup>th</sup> century the definition of fraud was wide and included cases of concealment and also cases where fraud appeared from the intrinsic nature and subject of the bargain itself. See Whittaker and Zimmermann, pp 41-42.

<sup>390</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*. Court of Appeal (Civil Division), [1989] QB 433, 12 November 1987, p 439 (Lord Bingham). See also Chitty on Contracts 2015, para 1-039; Whittaker and Zimmermann, pp 39-41; Brownsword, p 111; J. M. Paterson. Good Faith Duties in Contract Performance. – Oxford University Commonwealth Law Journal 2014/14(2), p 285. For an overview of arguments in favour and against of such a general obligation of good faith see Brownsword, Chapter 6.

<sup>391</sup> However, N. Hofmann argues that since Article 7 of the CISG is not as far reaching as the principle of good faith in German law then, ‘[i]f England were to adopt the CISG, good faith notion found in Article 7 should not materially alter or introduce major changes into English law.’ See Hofmann, p 167.

<sup>392</sup> Fauvarque-Cosson and Mazeaud, p 199; Paterson, pp 284, 290.



developed piecemeal solutions in response to demonstrated problems of unfairness', in particular, rules of construction and implied terms.<sup>393</sup> Whether English law's recourse to these is satisfactory is a matter of dispute.<sup>394</sup>

In English law, good faith and fairness or reasonableness are relevant only exceptionally.<sup>395</sup> Arguments of fairness, reasonableness, and business efficacy play an important role in contract construction, i.e. in the interpretation of express terms and in the implication of contract terms.<sup>396</sup> Well-established implied terms reflecting good faith include duties of honesty; cooperation, which may include duties of disclosure; duty to exercise contractual discretionary powers honestly and in good faith; and not acting arbitrarily, capriciously, or unreasonably.<sup>397</sup> The obligation to exercise contractual discretion in good faith was recently confirmed by the United Kingdom Supreme Court in *British Telecommunications Plc v Telefonica O2 UK Ltd*.<sup>398</sup>

In addition, English courts have developed various legal doctrines, such as economic duress and frustration.<sup>399</sup> While contract construction necessarily has implications to contract performance, good faith as a standard of behaviour is not generally implied by law but rather in fact. Good faith as a standard of behaviour was described in *Berkeley Community Village* by Morgan J as an 'obligation to observe reasonable commercial standards of fair dealing in accordance with their actions that related to the agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectation of the other party to the agreement.'<sup>400</sup>

Good faith is recognised with regard to certain specific contracts *uberrimae fidei*, i.e. of utmost good faith, such as contracts arising from fiduciary relations, contracts of partnership and of employment, and contracts of insurance.<sup>401</sup> In such cases, the parties owe each other duties to consider each other's interests, to act honestly, and to disclose material

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<sup>393</sup> *Interfoto Picture Ltd v Stiletto Visual Programmes Ltd*, p 439 (Lord Bingham); Paterson, p 285.

<sup>394</sup> Fauvarque-Cosson and Mazeaud, p 199; Whittaker and Zimmermann, p 47.

<sup>395</sup> Chitty on Contracts 2015, para 1-044.

<sup>396</sup> *Ibid*, para 1-051; Whittaker and R. Zimmermann, pp 45-46. See also S. Banakas. Liability for Contractual Negotiations in English Law: Looking for the Litmus Test. – InDret 2009/1, p 13; Cremades, p 774; Hofmann, p 163; Dunné, p 6.

<sup>397</sup> *Yam Seng Pte Ltd v International Trade Corp Ltd*. Queen's Bench Division, [2013] EWHC 111 (QB), 1 February 2013, paras 135, 139, 142, 145; Paterson, p 286.

<sup>398</sup> *Telefonica O2 UK Ltd v British Telecommunications Plc*. Supreme Court, [2014] UKSC 42, 09 July 2014, para 37 (Lord Sumption).

<sup>399</sup> Whittaker and Zimmermann, p 47.

<sup>400</sup> *Berkeley Community Villages Ltd v Pullen*. Chancery Division, [2007] EWHC 1330 (Ch), 07 June 2007, para 97.

<sup>401</sup> Chitty on Contracts 2015, para 1-044; Fauvarque-Cosson and Mazeaud, p 201; Whittaker and Zimmermann, pp 45-46.

information.<sup>402</sup> In contrast, English law denies any general duty to disclose information on one party to a contract to the other.<sup>403</sup>

Statutory intervention imposing good faith has been limited to unfair dismissal of employees and the law protecting residential and commercial tenants from forfeiture.<sup>404</sup> English law has had to recognise the principle of good faith imposed by virtue of EU law, in particular in the field of consumer law regulating informational duties and unfair contract terms.<sup>405</sup> However, a duty of good faith which is applicable only to certain contracts or by virtue of specific statutory provisions does not amount to a general recognition of the principle of good faith.

Concerning good faith as a standard of behaviour in contract performance, the English law has become more willing to recognise express<sup>406</sup> and implied terms of good faith or fairness in contracts.<sup>407</sup> It was held in the recent English High Court case of *Yam Seng PTE Ltd v International Trade Corp Ltd* that a duty of good faith could be implied in fact into the contract in certain circumstances, in particular in longstanding relationships.<sup>408</sup> Moreover, Leggatt J appeared on occasion to even extend the applicability of good faith to most, if not all commercial contracts, prohibiting, in addition to dishonesty, ‘improper’, ‘commercially unacceptable’, or ‘unconscionable’ conduct.<sup>409</sup> Nevertheless, subsequent judicial comments have limited the implied duty of good faith to certain categories of contract dependant on the context and confirmed that there is no general doctrine of good faith in English contract

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<sup>402</sup> Chitty on Contracts 2015, para 1-045, 2-216.

<sup>403</sup> *Smith v Hughes*. Court of Queen's Bench, (1870-71) LR 6 QB 597, 06 June 1871; *ING Bank NV v Ros Roca SA*. Court of Appeal (Civil Division), [2011] EWCA Civ 353, 31 March 2011, para 92. See also Chitty on Contracts 2015, at 2-216; Whittaker and Zimmermann, pp 195-196; Rossum, p 311.

<sup>404</sup> Whittaker and Zimmermann, p 46.

<sup>405</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ L 95, 21 April 1993, pp 29–34; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. OJ L 271, 9 October 2002, pp 16–24; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’). OJ L 149, 11 June 2005, pp 22–39. See also Chitty on Contracts 2015, para 1-043.

<sup>406</sup> E.g. *Berkeley Community Villages Ltd v Pullen*, para 97.

<sup>407</sup> Chitty on Contracts 2015, paras 1-048, 1-049, 1-050, 1-052, 1-053.

<sup>408</sup> *Yam Seng PTE Ltd v International Trade Corp Ltd*. See also *D&G Cars Ltd v Essex Police Authority*. Queen's Bench Division, [2015] EWHC 226 (QB), 13 February 2015, paras 174–176; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd*. Intellectual property Enterprise Court, [2014] EWHC 2145 (Ch), 02 July 2014, paras 173-177, 196. For an analysis of the case see E. McKendrick. Good Faith in the Performance of a Contract in English Law in L. DiMatteo and M. Hogg. (Eds). *Comparative Contract Law: British and American Perspectives*. Oxford Scholarship Online 2016, pp 196-209.

<sup>409</sup> *Yam Seng PTE Ltd v International Trade Corp Ltd*, paras 132, 135-136, 138.

law.<sup>410</sup> Therefore, an obligation of good faith contractual performance might be recognised by the courts only if expressly or implicitly agreed so by the parties but not by law.<sup>411</sup>

As a result, English law has been even more reluctant to apply the principle of good faith to the pre-contractual stage.<sup>412</sup> Agreements to agree have not been recognised as enforceable contracts.<sup>413</sup> The longstanding position in English law on good faith negotiations in *Walford v Miles*, concerning an express agreement to negotiate, is that:

[t]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. [...] A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.<sup>414</sup>

Thus, in English law agreements to negotiate in good faith have been traditionally unenforceable due to lack of certainty.<sup>415</sup> The parties are free to hold parallel negotiations and terminate negotiations at any time without incurring liability.<sup>416</sup> However, this is without prejudice to prohibited types of behaviour such as misrepresentation, fraud, force and fear, or undue influence.<sup>417</sup> For breach of confidence, there may be liability in tort.<sup>418</sup>

Some recent cases have recognised the possible enforceability of express agreements to negotiate in circumstances where consideration is provided and the parameters, including a time limit and objectives of the negotiations, are clear.<sup>419</sup> In *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)* the Court of Appeal took a more liberal approach compared to *Walford v Miles* and rejected the unenforceability due to the uncertainty argument.<sup>420</sup> Nevertheless, Longmore LJ recognised the difficulty in establishing whether negotiations

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<sup>410</sup> *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust*. Court of Appeal (Civil Division), [2013] EWCA Civ 200, 15 March 2013, paras 105. See also Dunné, p 5.

<sup>411</sup> *Yam Seng PTE Ltd v International Trade Corp Ltd*, paras 131-132; *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust*, para 105. See also Fonseca, pp 7-8; Paterson, pp 286, 291.

<sup>412</sup> See also Chitty on Contracts 2015, para 2-200; Coshier, p 492.

<sup>413</sup> *Ridgway v Wharton*. Court of Queen's Bench, [1857] 10 ER 1287 (QB), 26 June 1857, p 1313; *May & Butcher Ltd v King*. The House of Lords, [1934] 2 KB 17, 22 February 1929, p 21.

<sup>414</sup> *Walford v Miles*, p 138 (Lord Ackner). See also *Barbudev v Eurocom Cable Management Bulgaria Eood*. Court of Appeal (Civil Division), [2012] EWCA Civ 548, 27 April 2012, paras 44-46; *Sax v Tchernoy*, para 67.

<sup>415</sup> M. Chen-Wishart. *Contract Law*. 2<sup>nd</sup> ed. New York: Oxford University Press 2008, pp 105-107.

<sup>416</sup> Quagliato, pp 217-218.

<sup>417</sup> Fauvarque-Cosson and Mazeaud, p 187.

<sup>418</sup> See *OBG Ltd v Allan*. House of Lords, [2007] UKHL 21, 02 May 2007.

<sup>419</sup> *Cable & Wireless Plc v IBM United Kingdom Ltd*. Queen's Bench Division, [2002] EWHC 2059 (Comm), 11 October 2002 (concerning an unqualified alternative dispute resolution clause); *Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)*. Court of Appeal (Civil Division), [2005] EWCA Civ 891, 15 July 2005, paras 115-121 (concerning an obligation to negotiate costs); *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*. Queen's Bench Division, [2014] EWHC 2104 (Comm), 01 July 2014, para 26 (concerning an obligation to hold 'friendly discussions' for four weeks before resorting to arbitration).

<sup>420</sup> *Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)*, paras 117, 121.

have been broken off in bad faith and admitted that, in the absence of fraud, it would be unlikely that there would be a finding of bad faith.<sup>421</sup> Thus, there is no radical departure from the settled case law emphasising that English law does not recognise a general duty to negotiate in good faith.

H. Collins argues that the recent evolutions of English law, which have been in part already outlined above, amount to recognition of a ‘duty to negotiate with care’<sup>422</sup> that in practice imposes upon the negotiating parties largely identical requirements as the *culpa in contrahendo* doctrine.<sup>423</sup> The obligations include a) an obligation not to make any misrepresentation, b) obligation of information, c) obligation of good faith in *uberrimae fidei* contracts, and d) obligation of confidentiality. A breach of these obligations is sanctioned in accordance with the principles of misrepresentation, undue influence, collateral contracts, equitable estoppel, and implied contracts.<sup>424</sup>

The author of the master thesis is of the opinion that the ‘duty to negotiate with care’ is narrower than an obligation to negotiate in good faith. Unless there is a power imbalance, e.g. in a consumer contract, prohibiting undue influence, the obligation of information is limited to the terms of the proposed transaction and does not include surrounding circumstances.<sup>425</sup> Thus, protection is generally afforded only against fraudulent non-disclosure. Similarly, the contracts of utmost good faith are limited to certain special relationships. The author has already argued above that these limitations preclude inferring a general obligation to negotiate in good faith.

It is not precluded that the general standard of good faith in consumer law further influences the evolution of English private law towards a general principle of good faith governing all pre-contractual negotiations.<sup>426</sup> M. Hesselink, however, states that English courts ‘do not have a tradition of regarding a specific statutory change as evidence of a broader underlying legislative intent to which they should give effect.’<sup>427</sup>

In summary, English law recognises good faith contractual performance only to a limited extent. Lacking an express and clear undertaking to negotiate in good faith, English law does not recognise a general duty to negotiate in good faith but limits it to the prohibition of fraud,

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<sup>421</sup> *Petromec Inc v Petroleo Brasileiro SA Petrobras* (No 3), para 119.

<sup>422</sup> H. Collins. *The Law of Contract*. 4th ed. UK: LexisNexis 2003, pp 179-220.

<sup>423</sup> Fauvarque-Cosson and Mazeaud, p 187.

<sup>424</sup> Collins, pp 179-220; Fauvarque-Cosson and Mazeaud, p 187.

<sup>425</sup> Collins, pp 198-199.

<sup>426</sup> *Ibid*, p 217; Dunné, p 5. See also McKendrick in DiMatteo and Hogg, p 198.

<sup>427</sup> Hesselink, p 167.

force and fear, and the duty of confidentiality. Thus, compared to the civil law tradition, English common law imposes more lenient information obligations and does not sanction breaking off negotiations in bad faith.

#### 2.4.2 United States Law

Recognition of good faith as a general principle of law in other common law jurisdictions is rather a recent, but significant, development.<sup>428</sup> The recognition of good faith in contractual performance in the United States is inspired by German law.<sup>429</sup> In contrast to English law, US courts have recognised a duty to perform contracts in good faith<sup>430</sup> and this is reflected also in Section 1-304 of the Uniform Commercial Code (UCC)<sup>431</sup> and Section 205 of the 1981 Restatement (Second) of Contracts.<sup>432</sup> Interestingly, American lawyers, perhaps due to being more familiar with the UCC, frequently take the advantage of Article 6 of the CISG to exclude it from international sales contract.<sup>433</sup>

Article 1-201(20) of the UCC defines good faith as ‘honesty in fact and the observance of reasonable commercial standards of fair dealing’ and is recognised by the majority of American jurisdictions.<sup>434</sup> According to Article 1-302(b) the obligation of good faith may not be disclaimed by the parties by agreement but the parties may determine the standards of good faith performance.

According to R. S. Summers, good faith is not limited to honesty<sup>435</sup> and is best understood as an ‘excluder’ by ruling out different forms of bad faith.<sup>436</sup> Section 205 of the Restatement (Second) of Contracts is inspired by R. S. Summers’ theory<sup>437</sup> and the comments provide a non-exhaustive list of types of bad faith – ‘evasion of the spirit of the bargain, lack of

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<sup>428</sup> Farnsworth 1995, p 63; Cremades, pp 775, 779-780.

<sup>429</sup> Farnsworth 1995, pp 51-52.

<sup>430</sup> J. M. Perillo and J. E. Murray Jr. Corbin on Contract. Revised Edition. Vol 6. Matthew Bender & Company Inc 2015 (hereinafter Corbin on Contracts 2015, Vol 6), paras 26.2, 26-8; R. S. Summers. ‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code. – Virginia Law Review 1968/54(2), p 217; R. S. Summers. The General Duty of Good Faith – Its Recognition and Conceptualization. – Cornell Law Review 1982/67, pp 811-812. E.g. *Wigand v Bachmann-Bechtel Brewing Co.* New York Court of Appeals, (1918) 222 NY 272, p 277; *Kirke La Shelle Co v Paul Armstrong Co.* US New York Court of Appeals, (1933) 263 NY 79, 21 November 1933, p 167.

<sup>431</sup> The American Law Institute and the National Conference of Commissioners on Uniform State Laws. Uniform Commercial Code. American Law Institute 2014. It is a uniform act promulgated with the goal of harmonising the law of sales and other commercial transactions across the United States of America.

<sup>432</sup> The American Law Institute. Restatement of the Law, Second, Contracts. United States: American Law Institute 1981 (hereinafter Restatement (Second) of Contracts). It is a non-binding legal treatise seeking to inform judges and lawyers about general principles of contract common law.

<sup>433</sup> Corbin on Contracts 2015, Vol 6, paras 26-8.

<sup>434</sup> *Ibid*, paras 26-2, 26-8; Nedzel, p 102.

<sup>435</sup> Summers 1968, pp 204-206, 218, 220.

<sup>436</sup> *Ibid*, pp 196, 200-201, 206; Summers 1982, pp 818-819.

<sup>437</sup> Summers 1982, pp 813, 820.

diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.<sup>438</sup>

An alternative conceptualisation is provided by S. J. Burton, who argues that the duty to perform in good faith comes down to reasonable exercise of discretion, which is not the case where a party tries to recapture forgone opportunities.<sup>439</sup> The latter approach is reflected, for example, in *Nicholson v United Pacific Insurance Co*, where it was held that 'an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.'<sup>440</sup>

In practice, however, the theories are rather complementary than opposing.<sup>441</sup> Nevertheless, P. MacMahon argues that good faith and fair dealing are underenforced in practice as a result of restrictive doctrinal tests and deferential standards of review.<sup>442</sup> Despite the courts' reluctance to award remedies for its violation, the norm of good faith and fair dealing binds the parties.<sup>443</sup>

However, similarly to English law, in the US the idea of freedom of contract, revocability of offers,<sup>444</sup> and the traditional aleatory view of negotiations leave the parties free to break off negotiations without risk of pre-contractual liability.<sup>445</sup> Otherwise the parties might be discouraged from entering into negotiations.<sup>446</sup> There has been reluctance even to enforce preliminary agreements to negotiate.<sup>447</sup> While enforceability is supported by academics, case

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<sup>438</sup> Restatement (Second) of Contracts, Section 205, comments a and d. Cf Summers 1968, p 203; Summers 1982, p 820.

<sup>439</sup> S. J. Burton. Breach of Contract and the Common Law Duty to Perform in Good Faith. – Harvard Law Review 1980/94, pp 369, 373, 378, 403; S. J. Burton. More on Good Faith Performance of a Contract: A Reply to Professor Summers. – Iowa Law Review 1984/69, p 500. For a debate on these conceptualizations see Burton 1980; Summers 1982; Burton 1984.

<sup>440</sup> *Nicholson v United Pacific Insurance Co*. US Supreme Court of Montana, (1985) 219 Mont 32, 17 December 1985, p 42.

<sup>441</sup> Farnsworth 1995, p 60; Fauvarque-Cosson and Mazeaud, p 161.

<sup>442</sup> See generally P. MacMahon. Good Faith and Fair Dealing as an Underenforced Legal Norm. – Minnesota Law Review 2014-2015/99.

<sup>443</sup> MacMahon, p 2056.

<sup>444</sup> However, in circumstances provided for by Section 87(2) of the Restatement (Second) of Contracts offer is irrevocable.

<sup>445</sup> Kessler and Fine, p 432; Farnsworth 1987, p 221; Corbin on Contracts 2015, Vol 6, para 26.9.

<sup>446</sup> Farnsworth 1987, pp 221, 242.

<sup>447</sup> Corbin on Contracts 2015, Vol 6, para 26.9.

law is divided regarding the enforceability of preliminary agreements, including agreements with open terms and agreements to negotiate.<sup>448</sup>

Comment c to Section 205 of the Restatement (Second) of Contracts provides that Section 205, like Article 1-203 of the UCC, ‘does not deal with good faith in the formation of a contract.’ It further explains that

[p]articular forms of bad faith in bargaining are the subjects of rules as to capacity to contract, mutual assent and consideration and of rules as to invalidating causes such as fraud and duress. See, for example, §§ 90 and 208. Moreover, remedies for bad faith in the absence of agreement are found in the law of torts or restitution. For examples of a statutory duty to bargain in good faith, see, e.g., National Labor Relations Act § 8(d) and the federal Truth in Lending Act. In cases of negotiation for modification of an existing contractual relationship, the rule stated in this Section may overlap with more specific rules requiring negotiation in good faith. See §§ 73, 89; Uniform Commercial Code § 2-209 and Comment.

As is common to most legal systems, US law prohibits fraudulent and coercive conduct during pre-contractual negotiations. In addition, Section 208 of the Restatement (Second) of Contracts allows avoiding unconscionable contracts or contract terms, and Section 90 protects reasonable reliance on a promise. Thus, if agreement is reached, the contract can nevertheless be avoided on the grounds of misrepresentation, duress, undue influence, and unconscionability but there is no recourse to damages.<sup>449</sup> However, if the ‘preliminary negotiations’ fail, absent misrepresentation or deceit, the courts have traditionally been reluctant to impose pre-contractual liability.<sup>450</sup>

E. A. Farnsworth argues that the established bases of liability, such as unjust enrichment, misrepresentation, and specific promise,<sup>451</sup> if creatively used by litigants and liberally applied by courts, could afford the parties sufficient protection.<sup>452</sup> While some scholars support a general obligation as a basis of liability, it is not supported by American courts.<sup>453</sup> The author of the master thesis is of the opinion that the piecemeal solutions and, moreover, the commended liberal application of such rules, cannot amount to a general obligation. E. A.

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<sup>448</sup> Farnsworth 1987, p 264; Mirmina, p 96; Nedzel, pp 101, 118, 122; Quagliato, p 219; D. P. Warner. Good Faith: The New Frontier of Agreements to Negotiate (3 July 2013). – <https://corpgov.law.harvard.edu/2013/07/03/good-faith-the-new-frontier-of-agreements-to-negotiate/> (19 April 2016); Corbin on Contracts 2015, Vol 6, para 26.9.

<sup>449</sup> Farnsworth 1987, pp 221, 269.

<sup>450</sup> *Ibid*, p 221. See also A. Schwartz and R. E. Scott. Precontractual Liability and Preliminary Agreements. – Harvard Law Review 2007/120(3), pp 664, 672. See e.g. PFT Roberson Inc v Volvo Trucks North America Inc. US Court of Appeals, Seventh Circuit, (7th Cir 2005) 420 F 3d 728, 25 August 2005. See also MacMahon, p 2057, note 36; V. P. Goldberg. Protecting Reliance. – Columbia Law Review 2014/114, p 1042.

<sup>451</sup> See subsection 2.4.5 below.

<sup>452</sup> Farnsworth 1987, p 220.

<sup>453</sup> *Ibid*, pp 222, 239.

Farnsworth opines that as long as the grounds are not often invoked and pushed to their limits there is little pressure for such general obligation.<sup>454</sup>

As already argued above with regard to English law, the specific statutory duties to bargain in good faith also do not amount to a general recognition of an obligation to negotiate in good faith. Nevertheless, E. A. Farnsworth has used the statutory duty to bargain in good faith in the National Labor Relations Act<sup>455</sup> by analogy to substantiate the duty of good faith in the context of preliminary agreements, which as he opines should be enforced under contract law and thus be subject to the duty of good faith.<sup>456</sup>

E. A. Farnsworth distinguishes between preliminary agreements with open terms and preliminary agreements to negotiate,<sup>457</sup> which both are subject to issues related to certainty and intent – two important contract formation requirements.<sup>458</sup> With regard to preliminary agreements with open terms, he argues that the emerging legal rule imposes upon the parties a general implicit obligation of fair dealing in the negotiation of open terms, leaving the parties bound by the substantive terms previously agreed should the negotiations fail.<sup>459</sup> In *Teachers Insurance & Annuity Association of America v Tribune Co* it was held that an obligation to negotiate bars ‘a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement.’<sup>460</sup>

The breach of the duty to negotiate in good faith entitles the injured party to reliance damages and, in exceptional cases where such breach amounts to a serious breach, the injured party could withhold performance, and if the breach is uncured, terminate the contract and claim expectation damages and restitution.<sup>461</sup> On the other hand, preliminary agreements to negotiate impose a duty to negotiate in good faith the failure of which leaves parties without any agreement.<sup>462</sup> In this case, the injured party has no claim for expectation damages or specific performance but only under reliance or in some cases restitution.<sup>463</sup> A. Schwartz and

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<sup>454</sup> Farnsworth 1987, pp 242.

<sup>455</sup> National Labor Relations Act. 29 United States Code §§ 151-169. – <https://www.nlrb.gov/resources/national-labor-relations-act> (20 April 2016).

<sup>456</sup> Farnsworth 1987, p 220. *Contra* V. S. Foreman. Non-Binding Preliminary Agreements: The Duty to Negotiate in Good Faith and the Award of Expectation Damages. – University of Toronto Faculty of Law Review 2014/72, pp 17, 24-27.

<sup>457</sup> Cf *Teachers Insurance & Annuity Association of America v Tribune Co.* US District Court for the Southern District of New York, (SDNY 1987) 670 F Supp 491, 27 May 1987. The court distinguished between complete agreements preliminary only on form and agreements with open terms.

<sup>458</sup> Farnsworth 1987, pp 255-256, 264-267.

<sup>459</sup> *Ibid*, pp 249-250, 253; Schwartz and Scott, pp 664, 675, 691-692; Goldberg, pp 1042-1043.

<sup>460</sup> *Teachers Insurance & Annuity Association of America v Tribune Co*, p 498.

<sup>461</sup> Farnsworth 1987, p 255.

<sup>462</sup> *Ibid*, pp 251, 263.

<sup>463</sup> *Ibid*, pp 263-264.



R. E. Scott welcome the emerging rule with regard to reliance recovery, however, arguing from an economic perspective, they consider it unnecessary to require the parties to bargain in good faith.<sup>464</sup>

US courts have been divided with regard to the enforceability of preliminary agreements to negotiate.<sup>465</sup> Reasons for such reluctance include the indefiniteness of the preliminary agreements, difficulties determining the scope of the obligation of fair dealing (good faith), and uncertainty with regard to the appropriate remedy to be awarded.<sup>466</sup> Many US states, e.g. Georgia, Hawaii, Kentucky, Massachussets, Michigan, Minnesota, Nebraska, Tennessee, Texas, Utah, and Virginia, have refused to enforce agreements to negotiate at all.<sup>467</sup> On the other hand, some states, e.g. California, Delaware, Illinois, New York, and Washington, have long enforced agreements to negotiate, limiting recovery to reliance<sup>468</sup> damages.<sup>469</sup>

The leading case of the latter approach is *Itek Corp v Chicago Aerial Industries*, where the parties were held to be under a duty to make ‘every reasonable effort’ to agree upon a formal contract.<sup>470</sup> A recent example is the North Carolina Business Court decision in *RREF BB Acquisitions LLC v MAS Properties*.<sup>471</sup> Nevertheless, as emphasised in *Teachers Insurance & Annuity Association of America v Tribune Co*, a clear expression of intent is required to overcome the strong presumption against enforcement.<sup>472</sup> Lacking a clear expression of intent, the parties are merely in the preliminary negotiations phase to which no liability attaches.<sup>473</sup>

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<sup>464</sup> Schwartz and Scott, p 667.

<sup>465</sup> See Farnsworth 1987, p 264; Quagliato, p 219; Nedzel, pp 101, 118, 122; Mirmina, p 96.

<sup>466</sup> Farnsworth 1987, pp 264-267.

<sup>467</sup> Warner; Foreman, p 20. See e.g. *Virginia Power Energy Marketing Inc v EQT Energy LLC*. US District Court for the Eastern District of Virginia, (ED Va 2012) No. 3:2011cv00630 - Document 88, 15 July 2012.

<sup>468</sup> Exceptionally courts have been willing to award expectation damages. See e.g. *Network Enterprises Inc v APBA Offshore Productions Inc*. US District Court for the Southern District of New York (SDNY 2006) 427 F Supp 2d 463, 20 April 2006; *Columbia Park Golf Course, Inc. v City of Kennewick*. US Court of Appeals of Washington, Division 3, (Wash App 2011) 160 Wn App 66, 10 February 2011; *SIGA Techs Inc v Pharmathene Inc*. US Supreme Court of Delaware, (Del 2013) 67 A 3d 330, 24 May 2013, p 345.

<sup>469</sup> Warner; Foreman, p 20; R. A. Prosser. *Duty to Negotiate in Good Faith: Much Ado about Nothing?* – [http://www.poynerspruill.com/publications/Pages/DutytoNegotiateinGoodFaithMuchAdoAboutNothing.aspx?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://www.poynerspruill.com/publications/Pages/DutytoNegotiateinGoodFaithMuchAdoAboutNothing.aspx?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original) (19 April 2016).

<sup>470</sup> *Itek Corp v Chicago Aerial Industries*. Supreme Court of Delaware, (1968) 248 A 2d 625, 10 July 1968, p 629. See also *Thompson v Liquichimica of America Inc*. US District Court for the Southern District of New York (SDNY 1979) 481 F Supp 365, 1 November 1979; *Venture Associates Corp v Zenith Data Systems Corp*. US Court of Appeals, Seventh Circuit, (7<sup>th</sup> Cir 1993) 987 F 2d 429, 2 March 1993; *Stanford Hotels Corp v Potomac Creek Associates LP*. US District of Columbia Court of Appeals, (DC Ct App 2011) 18 A 3d 725, 21 April 2011.

<sup>471</sup> *RREF BB Acquisitions LLC v MAS Properties LLC*. North Carolina Superior Court, 2015 NCBC 58, 3 December 2015.

<sup>472</sup> *Teachers Insurance & Annuity Association of America v Tribune Co*, pp 497-498. See also *Itek Corp v Chicago Aerial Industries*, p 629.

<sup>473</sup> *PFT Roberson Inc v Volvo Trucks North America Inc*. See also Schwartz and Scott, p 674.

Only in some cases has a duty to negotiate in good faith been implied to the preliminary agreement.<sup>474</sup>

E. A. Farnsworth has substantiated the duty to negotiate in good faith by outlining, partly by analogy with the obligation to bargain in good faith in National Labor Relations Act,<sup>475</sup> seven types of bad faith conduct during contract negotiations:

- 1) refusal to negotiate, including dilatory tactics and making bargaining conditional upon unreasonable terms;
- 2) improper tactics amounting to fraud, duress, or lack of any kind of willingness to compromise;
- 3) unreasonable proposals;
- 4) non-disclosure about parallel negotiations or if disclosure is required to correct a previous statement, including notifying the other party of a change of mind regarding the intent to conclude an agreement. Absent a fiduciary duty,<sup>476</sup> a negotiating party does not have to disclose information relevant to its bargaining position;
- 5) if a definite undertaking that negotiations will be exclusive exists, holding parallel negotiations;
- 6) reneging contract terms already agreed to unless appropriate concessions are made;
- 7) breaking off negotiations before reaching an impasse or without other justified ground such as unfair dealing by the other negotiating party, mistake, impracticability, or changed circumstances, including an opportunity to conclude the deal with a third party.<sup>477</sup>

Similarly, R. S. Summers has argued that, substantively, good faith could be invoked to rule out various forms of bad faith at the negotiation and contract formation stage, including

negotiating without serious intent to contract, abusing the privilege to break off negotiations, entering into a contract without having the intent to perform, entering a deal recklessly disregarding prospective inability to perform, failing to disclose known defects in goods being sold, and taking undue advantage of superior bargaining power to strike an unconscionable bargain.<sup>478</sup>

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<sup>474</sup> *Channel Home Centers v Grossman*. US Court of Appeals, Third Circuit, (3rd Cir 1986) 795 F 2d 291, 30 June 1986, pp 298-300; *Copeland v Baskin Robbins USA*. US California Court of Appeal, (Ct App 2002) 96 Cal App 4<sup>th</sup> 1251, 19 March 2002. See also S. S. Ochayon. The Duty to Negotiate in Good Faith and its Application to Term Sheets and Letters of Intent (16 March 2008). – <http://swalegal.com/2008/03/16/the-duty-to-negotiate-in-good-faith-and-its-application-to-term-sheets-and-letters-of-intent/> (19 April 2016).

<sup>475</sup> Farnsworth 1987, pp 270-272.

<sup>476</sup> See Kessler and Fine, pp 441-442.

<sup>477</sup> Farnsworth 1987, pp 273-284.

<sup>478</sup> Summers, p 220.

To sum up, the obligation to negotiate in good faith arises only if expressly taken on by contract.<sup>479</sup> In any event, the expectations of the parties must be considered taking into account the language of the agreement and the surrounding circumstances.<sup>480</sup> It is useful to regulate in the agreement to negotiate the exclusivity of the negotiations, the duration of the negotiations, and duties of disclosure and confidentiality.<sup>481</sup> With the exception of the state of Louisiana and the territory of Puerto Rico,<sup>482</sup> there is no general obligation to negotiate in good faith in US contract law.<sup>483</sup> Nevertheless, US contract law recognises a duty to perform contracts in good faith.

### 2.4.3 Australian Law

In Australia, writers and courts below the level of the High Court of Australia (HCA) are generally quite open to the use of good faith,<sup>484</sup> but a clear position of the HCA on the issue is lacking.<sup>485</sup> Sir A. F. Mason has argued that the concept of good faith is part of Australian law.<sup>486</sup> J. W. Carter and E. Peden are of the opinion that good faith is inherent in contract law and that the proper basis of good faith is contract construction.<sup>487</sup> Thus, good faith does not need to be separately articulated either by implication of terms or through codification. Nevertheless, T. Wilson argues that ‘[i]n any codification or restatement of Australian contract law there should be some focus on “internationalisation” of contract law, including the incorporation of a good faith obligation’, which is important in the context of increased international trade, Australian law firms merging with international firms, and a desire to attract international litigation and arbitration to Australia.<sup>488</sup>

<sup>479</sup> Macmahon, p 2057, note 36; Corbin on Contracts 2015, Vol 6, para 26.9.

<sup>480</sup> Farnsworth 1987, p 272.

<sup>481</sup> *Ibid*; Corbin on Contracts 2015, Vol 6, para 26.9

<sup>482</sup> The legal systems of Louisiana and Puerto Rico can be described as mixed-civilian, as their civil codes are based on the French and Spanish Civil Codes respectively. See Mirmina, p 90, Nedzel, pp 140-141; Fonseca, p 3.

<sup>483</sup> Summers in Whittaker and Zimmermann, pp 122, 134; Mirmina, p 93; Fonseca, p 4; Hofmann, p 161; Corbin on Contracts 2015, Vol 6, para 26.9.

<sup>484</sup> Chitty on Contracts 2015, para 1-041.

<sup>485</sup> A. Hill. The Meaning of ‘Good Faith’ in Commercial Contracts in Australia. – McInnes Wilson Lawyers 2014. <http://www.lexology.com/library/detail.aspx?g=ec2810ee-f339-4ddf-9b42-1b189245f410> (16 April 2016), p 4; T. Wilson. The Challenges of Good Faith in Contract Law Codification in M. Keyes and T. Wilson. Codifying Contract Law. International and Consumer Law Perspectives. Routledge: Ashgate 2014, p 60; J. W. Carter. Good Faith in Contract: Why Australian Law is Incoherent (April 7, 2014). – Sydney Law School Research Paper No. 14/38. [https://papers.ssrn.com/sol3/Data\\_Integrity\\_Notice.cfm?abid=2421117](https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=2421117) (14 April 2016), p 2; J. Viven-Wilksch. The Adventures of Good Faith. Can Legal History and International Developments Provide Guidelines for Australia? – Alternative Law Journal 2015/40(2), p 89; A. Gray. Good Faith in Australian Contract Law After Barker. – Australian Business Law Review 2015/43.

<sup>486</sup> Mason, p 66.

<sup>487</sup> J. W. Carter and E. Peden. Good Faith in Australian Contract Law. – Journal of Contract Law 2003/19, p 156; Carter, p 9.

<sup>488</sup> Wilson, pp 57-58. See also Viven-Wilksch, p 90.

In commercial contractual performance and enforcement *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,<sup>489</sup> where reasonableness in performance was implied as a contract term, provides the basis for the emergence of a line of authority creating a common law obligation of good faith.<sup>490</sup> Further cases have substantiated good faith as:

- (a) not bad faith such as parties not acting opportunistically or using contract terms for purposes antithetical to the contract that are calculated to extract value from the other contracting party;
- (b) requiring parties to act honestly;
- (c) not acting arbitrarily, capriciously, unreasonably or recklessly;
- (d) not requiring a party to act in the interests of the other party to the contract;
- (e) not imposing obligations on the parties that, in effect, inconsistent with the terms of the contract;
- (f) incorporating reasonableness; and
- (g) being equated with fair dealing.<sup>491</sup>

According to Sir A. F. Mason, the concept is to embrace ‘no less than three related notions: (1) an obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself); (2) compliance with honest standards of conduct; and (3) compliance with standards of conduct which are reasonable having regard to the interests of the parties.’<sup>492</sup> These expressions of good faith are similar to those recognised by Legatt J in *Yam Seng*.<sup>493</sup>

The HCA in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*<sup>494</sup> and *Commonwealth Bank of Australia v Barker*<sup>495</sup> refused to decide the issue of good faith as unnecessary at that point. However, Kirby J in his dissent in *Royal Botanic Gardens* highlighted that an implied term in a commercial contract ‘appears to be inconsistent with the law as it has developed in Australia in respect of the introduction of implied terms into written contracts which the parties have omitted to include.’<sup>496</sup>

A decision of the HCA, i.e. the only court with the power to make new law, would be desirable as currently there are diverging views and approaches as to good faith’s mode of

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<sup>489</sup> *Renard Constructions (ME) Pty Ltd v Minister for Public Works*. New South Wales Court of Appeal, (1992) 26 NSWLR 234, 12 March 1992.

<sup>490</sup> Mason, p 67; Hill, p 3. See e.g. *Hughes Aircraft Systems International v Airservices Australia*. Federal Court of Australia, (1997) 146 ALR 1, 30 June 1997.

<sup>491</sup> Hill, pp 3-4 (citations and footnotes omitted).

<sup>492</sup> Mason, p 69. See also G. Kuehne. Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles. – University of Western Australia Law Review 2006/33, p 65.

<sup>493</sup> See also Paterson, pp 287-288.

<sup>494</sup> *Royal Botanic Gardens and Domain Trust v South Sydney City Council*. High Court of Australia, (2002) 186 ALR 289, 14 February 2002, para 40.

<sup>495</sup> *Commonwealth Bank of Australia v Barker*. High Court of Australia, (2014) 312 ALR 356, 10 September 2014, para 42.

<sup>496</sup> *Royal Botanic Gardens and Domain Trust v South Sydney City Council*, paras 86-88.

application and precise meaning among academics<sup>497</sup> and within Australian courts.<sup>498</sup> On the one hand, the courts of New South Wales<sup>499</sup> and along their lines the courts of South Australia, Western Australia and Queensland<sup>500</sup> have more or less recognised both express terms of good faith<sup>501</sup> and terms of good faith implied by law<sup>502</sup> in all commercial contracts as long as they do not conflict with express terms of the contract. On the other hand, the courts of Victoria and Tasmania have recognised express obligations of good faith<sup>503</sup> but have been more reluctant to imply good faith terms by law,<sup>504</sup> limiting such instances to certain contracts of imbalance of power<sup>505</sup> or implying good faith only as a matter of fact.<sup>506</sup> Thus, the duty of good faith, unless expressly and clearly agreed to by the parties themselves, is not universally recognised by Australian courts yet.<sup>507</sup>

Furthermore, J. W. Carter et al. argue that since intermediate appellate courts have only a limited ability to make new law, i.e. to decide upon a lack of implied good faith, the issue is resolved.<sup>508</sup> In *CGU Workers Compensation (NSW) Ltd v Garcia* and similarly in *Esso*

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<sup>497</sup> H. Munro. The 'Good Faith' Controversy in Australian Commercial Law: a Survey of the Spectrum of Academic Legal Opinion. – The University of Queensland Law Journal 2009/28(1). H. Munro also observes that the legal profession appears to take the obligation of good faith in contractual performance as settled law. See Munro, p 170.

<sup>498</sup> J. Edelman, J. Goudkamp, S. Degeling. Contemporary problems in the law of contract. – Australian Bar Review 2015/40, p 174; Hill, pp 13-18; Gray, pp 358-359. See also *Paciocco and Another v Australia and New Zealand Banking Group Ltd* (VID 141 of 2014). Full Court of the Federal Court of Australia. (2015) 321 ALR 584, 8 April 2015 (Appeal pending), paras 287-293. For a critical discussion of cases on contract construction by implication of terms see Carter.

<sup>499</sup> See e.g. *Alcatel Australia Ltd v Scarella and Others*. New South Wales Court of Appeal, (1998) 44 NSWLR 349, 16 July 1998; *Burger King Corporation v Hungry Jack's Pty Ltd*. New South Wales Court of Appeal, (2001) NSWLR 558, 21 June 2011.

<sup>500</sup> However, in Western Australia and Queensland the uncertainty of the state of law is noted and the obligation of good faith only assumed. See e.g. *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd*. Western Australia Court of Appeal, (2012) WASCA 165, 23 August 2012; *Kosho Pty Ltd v Trilogy Funds Management Ltd*. Supreme Court of Queensland, (2013) QSC 135, 20 June 2013.

<sup>501</sup> See e.g. *Minumbra Lancewood Pty Ltd v AM Lancewood Investment Nominees Pty Ltd*. New South Wales Supreme Court, (2013) NSWSC 1929, 20 December 2013.

<sup>502</sup> See e.g. *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*. New South Wales Court of Appeal, (2012) NSWCA 184, 21 June 2012, para 144.

<sup>503</sup> *North East Solutions Pty Ltd v Masters Home Improvement Australia Pty Ltd*. Supreme Court of Victoria, (2016) VSC 1, 28 January 2016.

<sup>504</sup> *Androvitsaneas v Members First Broker Network Pty Ltd*. Supreme Court of Victoria – Court of Appeal, (2013) VSCA 212, para 108. See also *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (No 6). Federal Court of Australia, (2015) FCA 825, 14 August 2015, paras 994, 1006.

<sup>505</sup> *Arhanghelschi v Ussher*. Supreme Court of Victoria, (2013), VSC 253, 16 May 2013.

<sup>506</sup> See e.g. *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, Supreme Court of Victoria Court of Appeal, (2005) VSCA 228, 15 September 2005; *Specialist Diagnostic Services Pty Ltd (formerly Symbion Pathology Pty Ltd) v Healthscope Pty Ltd & Ors*. Supreme Court of Victoria Court of Appeal, (2012) VSCA 175, 8 August 2012. See also Wilson, p 60.

<sup>507</sup> See also N. Bass. Eleventh Hour Collapse: an Elements-based Comparison of the German Doctrine of Culpā in Contrahendo and Australian Principles of Pre-contractual Liability. – Macquarie Journal of Business Law 2009/6, p 225.

<sup>508</sup> J. W. Carter, W. Courtney, E. Peden, J. Riley and G. J. Tolhurst. Terms Implied in Law: 'Trust and Confidence' in the High Court of Australia. *Journal of Contract law* 2015/32, pp 228-229.

*Australia Resources Pty Ltd v Southern Pacific Petroleum NL*,<sup>509</sup> it has been held that ‘good faith’ is not a term ‘to be inserted into every contract or even into every aspect of a particular contract’.<sup>510</sup> Intermediate appellate courts and trial judges in Australia should not depart from the decisions in intermediate appellate courts in another jurisdiction unless they are convinced that the interpretation is plainly wrong.<sup>511</sup> Thus, the state of law in Australia is that no term of good faith can be implied by law in all commercial contracts.<sup>512</sup> A. Gray hopes that in the light of recent English and Canadian Supreme Court judgments the HCA would in an appropriate case be more willing to recognise a good faith obligation.<sup>513</sup>

Sir A. F. Mason has suggested that Australian law incorporates some aspects of the good faith doctrine through the traditional equitable notions of equity, good conscience,<sup>514</sup> and bona fides and has shifted towards emphasising the need to take into account the other party’s reasonable expectations.<sup>515</sup> Similarly to English and US law, the Australian law prohibits misrepresentations, undue influence, and unconscionable conduct, and also provides for the doctrine of estoppel, including promissory estoppel.<sup>516</sup> T. Wilson argues that the doctrine of unconscionability resembles the principle of good faith by preferring substance over form and prohibiting unconscionable adherence to strict legal rights, i.e. abuse of rights.<sup>517</sup> However, the HCA has taken a narrow view of unconscionability allowing judicial intervention only in cases of substantial disadvantage<sup>518</sup> and not mere inequality of bargaining power.<sup>519</sup> Thus, the doctrine of unconscionability is narrower than the principle of good faith.<sup>520</sup>

Duties to take into account the expectations of the other party arise, e.g. in fiduciary relationships and by law in insurance contracts.<sup>521</sup> Statutory intervention has also been concerned with employment contracts and franchise agreements,<sup>522</sup> where the duty of good faith is required due to power imbalances. Australian expansive consumer protection

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<sup>509</sup> *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, paras 4 and 25. See also *Specialist Diagnostic Services Pty Ltd v Healthscope Pty Ltd*, para 86; *Androvitsaneas v Members First Broker Network Pty Ltd*, para 108.

<sup>510</sup> *CGU Workers Compensation (NSW) Ltd v Garcia*. New South Wales Court of Appeal, (2007) 69 NSWLR 680, 10 August 2007, para 132.

<sup>511</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*. High Court of Australia, (2007) 236 ALR 209, 24 May 2007, para 135.

<sup>512</sup> Carter, p 3; Carter et al., pp 228-229.

<sup>513</sup> Gray, p 360.

<sup>514</sup> See also Wilson, p 57.

<sup>515</sup> Mason, p 72.

<sup>516</sup> *Ibid*, p 73. See subsection 2.4.5 below.

<sup>517</sup> Wilson, p 67.

<sup>518</sup> *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*, para 4.

<sup>519</sup> *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*. High Court of Australia, (2003) 197 ALR 153, 9 April 2003, paras 11 and 14. See also Wilson, p 60.

<sup>520</sup> See also Wilson, p 72.

<sup>521</sup> Mason, pp 72-73.

<sup>522</sup> Hill, pp 25-26.

legislation includes general prohibitions on misleading or deceptive conduct and on unconscionable conduct occurring in 'trade or commerce'.<sup>523</sup> As of 12 November 2016, unfair contract term protections will also cover small business contracts and, thus, by the end of 2016, three-quarters of the final spending in Australia's economy will be expressly covered by a statutory obligation of good faith.<sup>524</sup> While there is no general statutory obligation of good faith yet, it is suggested that the time might be ripe for it.<sup>525</sup>

Good faith in Australia is mainly discussed in the context of contractual performance rather than pre-contractual negotiations as a result of the emphasis on freedom of contract.<sup>526</sup> In *Sabemo Pty Ltd v North Sydney Municipal Council* it was stated that:

It has long been the law that parties are free to negotiate such contract as they may choose to enter into. Until such contract comes about, they are negotiations only. Each is at liberty, no matter how capricious his reason, to break off negotiations at any time. If that occurs then it is the end of the matter and, generally speaking, neither party will be under any liability to the other.<sup>527</sup>

Sir A. F. Mason was cautious not to extend the duty of good faith to negotiations, unless there is an express and sufficiently certain agreement to negotiate in good faith.<sup>528</sup> For example, in *United Group Rail Services v Rail Corporation of New South Wales*,<sup>529</sup> the NSW Court of Appeal held that, while an agreement to agree that lacks essential terms was clearly unenforceable,<sup>530</sup> it did not follow that an agreement to negotiate in good faith to settle a dispute arising under a contract was unenforceable.<sup>531</sup>

In *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*<sup>532</sup> a preliminary agreement was enforced and a contractual obligation to disclose important information imposed. In addition to repeating the definition of good faith of Sir A. F.

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<sup>523</sup> Competition and Consumer Act 2010. No 51, 1974. Schedule 2, Australian Consumer Law, s 18. – <https://www.legislation.gov.au/Details/C2015C00327> (20 April 2016).

<sup>524</sup> A. Lacey. An Overarching Principle of Good Faith in Australia: Have we Reached Valhalla? (4 April 2016). – <http://www.lexology.com/library/detail.aspx?g=2c55836d-a177-42c1-aea9-fb111b35c402> (20 April 2016).

<sup>525</sup> *Ibid.*

<sup>526</sup> Viven-Wilksch, p 89. See also Bass, p 225. But see Munro, pp 173-174 referring to M. Rofail. Good Faith in the Making and Performance of Contracts. The University of Queensland. Unpublished PhD Thesis, 2003.

<sup>527</sup> *Sabemo Pty Ltd v North Sydney Municipal Council*. New South Wales Supreme Court. (1977) 2 NSWLR 880, 17 March 1977, p 900.

<sup>528</sup> Mason, pp 77, 81. The promise to negotiate in good faith must also be supported by consideration to be enforceable. See *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*. New South Wales Court of Appeal, (1991) 24 NSWLR 1, 5 July 1991, pp 21-27 (Kirby P).

<sup>529</sup> *United Group Rail Services Limited v Rail Corporation New South Wales*. New South Wales Court of Appeal, (2009) 74 NSWLR 618, 3 July 2009.

<sup>530</sup> *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*. High Court of Australia, (1982) 43 ALR 68, 22 September 1982, p 70.

<sup>531</sup> *United Group Rail Services Limited v Rail Corporation New South Wales*, paras 56, 81.

<sup>532</sup> *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*. New South Wales Court of Appeal, (2010) NSWCA 268, 14 October 2010.

Mason,<sup>533</sup> the court emphasised that when negotiating in good faith, an ‘objective element of reasonableness in fair dealing is appropriate, taking its place with honesty and fidelity to the bargain in the furtherance of the contractual objects and purposes of the parties, objectively ascertained.’<sup>534</sup> Nevertheless, the promise of good faith must be construed ‘having regard to the terms of the contract and the circumstances known to the parties in which it was entered into.’<sup>535</sup> More recently the Supreme Court of Victoria in *North East Solutions Pty Ltd v Masters Home Improvement Australia Pty Ltd* confirmed the enforceability of an express agreement to negotiate in good faith.<sup>536</sup>

To sum up, the duty of good faith in contractual performance has not been recognised in Australia at the level of the HCA and is extended to contract negotiations only where an express and clear agreement to that regard exists.

#### 2.4.4 Canadian Law

In Canada, the principle of good faith in the performance of contracts is now recognised both in its civil law province Quebec<sup>537</sup> and the common law provinces and territories. Aiming to resolve uncertainties arising from case law, the British Columbia Law Institute (BCLI) in 2011 published a report recommending the inclusion of the obligation of good faith contractual performance in a draft Contract Fairness Act. It defines good faith as:

- (a) exercise discretionary powers conferred by a contract reasonable and for their intended purpose,
- (b) cooperate in securing performance of the main objects of the contract, and
- (c) refrain from strategic behaviour designed to evade contractual obligations.<sup>538</sup>

The BCLI also considered that the time is not ripe to extend the duty to pre-contractual negotiations.<sup>539</sup> However, the Contract Fairness Act has not been adopted by the British Columbia Legislative Assembly.

The Supreme Court of Canada (SCC) has forestalled the HCA and brought some clarity to common law Canada.<sup>540</sup> In November 2014 in *Bhasin v Hrynew*, it clearly recognised that

<sup>533</sup> *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*, para 146.

<sup>534</sup> *Ibid*, para 15.

<sup>535</sup> *Ibid*, para 137.

<sup>536</sup> *North East Solutions Pty Ltd v Masters Home Improvement Australia Pty Ltd*.

<sup>537</sup> Quebec’s legal system follows the civil law tradition, and recognises the principle of good faith and the duty to negotiate in good faith. Civil Code of Quebec. - [http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ\\_1991/CCQ1991\\_A.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html) (14 April 2016), Articles 6, 7 and 1375.

<sup>538</sup> British Columbia Law Institute. Report on Proposals for Unfair Contracts Relief. Report No 60 (September 2011). - [http://www.bcli.org/sites/default/files/2011-09-28\\_BCLI\\_Report\\_on\\_Proposals\\_for\\_Unfair\\_Contracts\\_Relief\\_%28FINAL%29.pdf](http://www.bcli.org/sites/default/files/2011-09-28_BCLI_Report_on_Proposals_for_Unfair_Contracts_Relief_%28FINAL%29.pdf) (14 April 2016), pp 18-19.

<sup>539</sup> *Ibid*, p 36.



good faith contractual performance is a general ‘organizing principle’ of Canadian common law, operating irrespective of the intentions of the parties, imposing upon the parties to a contract a duty to act honestly in the performance of their contractual obligations.<sup>541</sup> It manifests itself through existing doctrines such as unconscionability, implied terms and principles of interpretation, duties of honesty and reasonableness, and prohibition to act capriciously or arbitrarily in contractual performance.<sup>542</sup> It requires the party performing the contract to consider, but not necessarily serve, the legitimate contractual interests of the contracting partner.<sup>543</sup>

The new general duty of honesty is limited to a duty ‘not to lie or mislead the other party about one’s contractual performance’ and does not require loyalty, disclosure, or foregoing advantages flowing from the contract.<sup>544</sup> The duties are similar to the duties of implied good faith in England and Australia.<sup>545</sup> Nevertheless, the effect of *Bhasin v Hrynew* for all cases is limited to the minimum requirement of honesty, which the parties may not exclude, and the further scope of the duties of good faith depends on the relationship.<sup>546</sup> Thus, G. R. Hall argues that *Bhasin v Hrynew* is ‘only a step towards an organising principle of good faith in contract law’.<sup>547</sup>

With the exception of Quebec,<sup>548</sup> Canadian courts have not accepted that there is an obligation to conduct negotiations in good faith extending beyond the requirement of honesty absent a special relationship such as in the context of commercial tendering or insurance.<sup>549</sup> As opposed to the English courts, the SCC has explicitly rejected imposing duties of disclosure between the negotiating parties through the tort of negligence as undermining the proper risk allocation during the negotiations and conflicting with the idea of adversarial negotiations and

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<sup>540</sup> G. R. Hall argues that *Bhasin v Hrynew*, failing to provide a definition of good faith, did not resolve the existing uncertainty, incoherence, and *ad hoc* nature of existing law. See G. R. Hall, *Bhasin v. Hrynew: Towards an Organising Principle of Good Faith in Contract Law*. – *Banking & Finance Law Review* 2015/30, pp 342-343.

<sup>541</sup> *Bhasin v Hrynew*. Supreme Court of Canada, (2014) SCR 494, 13 November 2014, paras 33, 74 (Cromwell J).

<sup>542</sup> *Ibid*, paras 43-45, 63.

<sup>543</sup> *Ibid*, para 65.

<sup>544</sup> *Ibid*, para 73.

<sup>545</sup> See also Paterson, p 289.

<sup>546</sup> T. Buckwood, *The Enforceability of Agreements to Negotiate in Good Faith: the Impact of Bhasin v. Hrynew and the Organizing Principle of Good Faith in Common Law Canada*. – [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2758844](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758844) (26 April 2016), pp 11-12, 20, 24.

<sup>547</sup> Hall, p 336.

<sup>548</sup> Civil Code of Quebec, Article 1375.

<sup>549</sup> *Martel building Ltd v Canada*. Supreme Court of Canada, (2000) 2 SCR 860, 30 November 2000, paras 67, 72-73; *Oz Optics Ltd v Timbercon Inc*. Ontario Court of Appeal, (2011) ONCA 714, 15 November 2011, para 71. See also A. Swan and J. Adamski, *Halsbury's Laws of Canada – Contracts*. Reissue. Canada: LexisNexis 2013 (hereinafter *Halsbury's Laws of Canada – Contracts*), HCO-37.

parties' freedom to withdraw from negotiations.<sup>550</sup> It has referred to other causes of action, such as undue influence, economic duress, unconscionability, negligent misrepresentation, fraud, and the tort of deceit as covering much of the wrongful conduct committed during negotiations and providing appropriate remedies.<sup>551</sup>

On the influence of English case law, courts in common law Canada have generally also refused to enforce any agreements to negotiate in good faith due to uncertainty.<sup>552</sup> However, in *Empress Towers Ltd v Bank of Nova Scotia* a principle was advanced that an agreement to negotiate in good faith is enforceable if it refers to an objective standard guiding the conduct of negotiations.<sup>553</sup> In *Molson Canada 2005 v Miller Brewing Co* it was held that such agreements need to be interpreted in their context in accordance with the parties' intentions and may be sufficiently certain to be enforceable.<sup>554</sup>

It might be that after the SCC's decision in *Bhasin v Hrynew* the courts are more willing to enforce agreements to negotiate even without an articulated objective standard.<sup>555</sup> The duty of good faith in negotiations is still limited to honesty and having appropriate regard for the legitimate contractual interests of the contracting partner, including not eviscerating the very purpose of the agreement. The latter duty entails an obligation to make genuine efforts to reach an agreement and may be breached in cases of refusing to negotiate, taking unflinching positions, and bargaining with no intention to reach an agreement.<sup>556</sup>

In conclusion, while the duty of good faith in contractual performance is recognised in Canada, it is not extended to contract negotiations absent an express and clear agreement to that regard.

## **2.4.5 Alternative Approaches to Protecting Pre-contractual Reliance**

Alternative routes are pursued in common law jurisdictions in order to reach just results for the negotiating parties in cases of possible bad faith conduct during contract negotiations.<sup>557</sup> It

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<sup>550</sup> *Martel building Ltd v Canada*, paras 67-68; Halsbury's Laws of Canada – Contracts, HCO-37; Cartwright and Hesselink, p 466.

<sup>551</sup> *Martel building Ltd v Canada*, para 70.

<sup>552</sup> Halsbury's Laws of Canada – Contracts, HCO-37.

<sup>553</sup> *Empress Towers Ltd v Bank of Nova Scotia*. British Columbia Court of Appeal, (1990) 50 BCLR (2d) 126, 21 September 1990.

<sup>554</sup> *Molson Canada 2005 v Miller Brewing Co*. Ontario Superior Court of Justice, (2013) ONSC 2758, 20 June 2013, paras 96, 108. See also *SCM Insurance Services Inc v Medisys Corporate Health LP*. Ontario Superior Court of Justice, (2014) ONSC 263, 28 April 2014.

<sup>555</sup> See also *Buckwood*, pp 1-2, 15, 20, 36; *0856464 BC Ltd v TimberWest Forest Corp*. British Columbia Supreme Court, (2014) BCSC 2433, 23 December 2014.

<sup>556</sup> *Buckwood*, pp 25-29.

<sup>557</sup> See also *Quagliato*, p 217.

has been stated that in English law problems of unfairness are dealt with by piecemeal solutions.<sup>558</sup> In *Yam Seng v ITC*, Leggatt J, having studied English case law, determined that different doctrines, such as implied contract, claims of restitution, misrepresentation, equitable estoppel, or unjust enrichment, are applied to protect from breaches of good faith in pre-contractual negotiations.<sup>559</sup> Similar solutions exist in other common law jurisdictions, e.g. Australia and Canada. It has been suggested that in the US the doctrinal functions of *culpa in contrahendo* have been served, among others, by relaxing some of the contract formation elements and by the doctrines of implied contract, unjust enrichment, estoppel, fraud, misrepresentation, and negligence in order to protect reasonable reliance on a promise.<sup>560</sup>

In the following, the doctrines of restitution, promissory estoppel, misrepresentation, and the tort of deceit in the common law are discussed and compared with the doctrine of *culpa in contrahendo* in the civil law.<sup>561</sup> It has been argued that these doctrines do not adequately deal with pre-contractual liability compared to *culpa in contrahendo*.<sup>562</sup> The author of the master thesis is of the opinion that while some aspects of the doctrine of *culpa in contrahendo* are covered by these piecemeal solutions, the differences in their recognition and application do not allow to infer a general duty to negotiate in good faith in the common law.

### ***Unjust Enrichment***

Under the doctrine of unjust enrichment, there is a duty to make restitution of unjust gains received during negotiations.<sup>563</sup> The principle of unjust enrichment requires: ‘first, that the defendant has been enriched by the receipt of a benefit [or has made a request]; secondly, that this enrichment is at the expense of the claimant; thirdly that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim.’<sup>564</sup> The benefit might result from money mistakenly paid to another party, a misappropriation of ideas which among others could amount to a breach of confidential relation, if such relation is pre-existing, or

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<sup>558</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, p 439.

<sup>559</sup> *Yam Seng Pte Ltd v International Trade Corp Ltd*, paras 135-141, 145. See also Fonseca, p 13.

<sup>560</sup> Kessler and Fine, pp 401, 408; Restatement (Second) of Contracts, Section 205, comment c. See also Summers 1968, pp 198, 217; Farnsworth 1987, pp 229-238; Nedzel, pp 98, 102, 119, 127-128.

<sup>561</sup> The doctrine of implied contract is concerned with contract interpretation and has been already discussed in the previous sections.

<sup>562</sup> Mirmina, p 78.

<sup>563</sup> Farnsworth 1987, pp 229-233; Chitty on Contracts 2015, para 29-017; Banakas, p 4.

<sup>564</sup> *British Steel Corp v Cleveland Bridge & Engineering Co Ltd*. Queen's Bench Division, [1981] 1 All ER 504 (QB), 21 December 1981; *Pettkus v Becker*. Supreme Court of Canada, (1980) 2 SCR 834, p 848. See also Chitty on Contracts 2015, para 29-017; Halsbury's Laws of Canada – Contracts, HCO-38. The test is not endorsed by the HCA. Australian courts have developed specific requirements for different types of claims in restitution claims. However, for the purposes of the master thesis, it is not necessary to undertake an in depth analysis of the doctrine of unjust enrichment.

from services rendered during unsuccessful negotiations upon the request of the other negotiating party.<sup>565</sup>

The requirements of benefit and/or request impose upon the injured party a heavy burden of proof. Moreover, a claim for unjust enrichment is not a claim for damages but a claim in debt.<sup>566</sup> Therefore, the doctrine of *unjust* enrichment does not provide recovery for out-of-pocket expenses related to negotiations – a risk taken by the negotiating party. Restitution based on unjust enrichment is also provided for in the civil law legal systems. Thus, the common law unjust enrichment doctrine does not improve the situation of the aggrieved negotiating party.

### ***Misrepresentation and Tort of Deceit***

To an extent, common law protects a negotiating party from the other party's fraudulent, negligent, and innocent misrepresentations.<sup>567</sup> In all common law jurisdictions, fraudulent misrepresentation provides a ground for rescinding the contract and a claim for damages in tort of deceit.<sup>568</sup> Even negligent and innocent material misrepresentations provide a ground for rescinding the contract.<sup>569</sup> However, innocent misrepresentation does not provide a cause of action for damages. Traditionally, negligent misrepresentation did not provide a cause of action for damages in tort as well.

Negligent misrepresentation as a cause of action for damages became recognised in English law after *Hedley Byrne*<sup>570</sup> and on its influence also in the common law of the US, Australia, and Canada.<sup>571</sup> In English law, since the coming into force of the Misrepresentation Act 1967, the representee who entered a contract as the result of a misrepresentation is able to claim

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<sup>565</sup> Farnsworth 1987, pp 229-233.

<sup>566</sup> Chitty on Contracts 2015, para 29-017.

<sup>567</sup> In US: UCC Articles 1-103 (b) and 2-721. See also Kessler and Fine, pp 433-434; Summers 1968, pp 220, 223, 257-258; Farnsworth 1987, pp 233-235. In English law: Misrepresentation Act 1967. – <http://www.legislation.gov.uk/ukpga/1967/7/contents> (21 April 2016); Walford v Miles, p 138; Chitty on Contracts 2015, para 7-001. In Australia: Halsbury's Law of Australia, paras 110-5210, 110-5225. In Canada: Halsbury's Laws of Canada – Contracts, HCO-120-123.

<sup>568</sup> J. Cartwright (Ed). Halsbury's Laws of England – Misrepresentation. Volume 76. LexisNexis 2013, para 701; UCC Article 2-721; 90. The American Law Institute. Restatement of the Law, Second, Torts. United States: American Law Institute 1977 (hereinafter Restatement (Second) of Torts), Article 549; LexisNexis. Halsbury's Laws of Australia. 110 Contract, Vitiating Factors (23.04.2016) (hereinafter Halsbury's Laws of Australia – Contract, Vitiating Factors), paras 110-5210, 110-5225; J. Jovellano and S. Margolis. Halsbury's Laws of Canada – Misrepresentation and Fraud. Reissue. LexisNexis 2015 (hereinafter Halsbury's Laws of Canada – Misrepresentation and Fraud), HMF-62.

<sup>569</sup> *Ibid.*

<sup>570</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. House of Lords, [1964] AC 465, 28 May 1963.

<sup>571</sup> Restatement (Second) of Torts, Article 552; Halsbury's Laws of Canada – Contracts, HCO-123; Halsbury's Laws of Canada – Misrepresentation and Fraud, HMF-37; *Queen v Cognos Inc*. Supreme Court of Canada, (1993) 1 SCR 87, 21 January 1993, para 33; *Hercules Managements Ltd v Ernst & Young*. Supreme Court of Canada, (1997) 2 SCR 165, 22 May 1997, para 24; Halsbury's Laws of Australia – Contract, Vitiating Factors, paras 110-5160.

damages both for fraudulent and negligent misrepresentation. In the latter case the representee might be prevented from rescinding the contract and may be awarded damages *in lieu* of rescission.<sup>572</sup> Liability in damages for negligent misrepresentation can arise only where a party owed the other party a duty of care.<sup>573</sup> While some differences between the common law legal systems exist as to when such a duty arises, there is a reluctance to recognise it as arising between all negotiating parties and also in instances where the damage is pure economic loss.<sup>574</sup>

In case the negotiations have failed there is no contract to rescind. Since negligent misrepresentation as a cause of action for damages is only available where a duty of care exists, the representor will usually have to bring a claim in fraud, which is not easy to prove.<sup>575</sup> In order to establish a cause of action in the tort of deceit, there must be a false representation made knowingly, without belief in its truth, or recklessly, with the intention of inducing the other party's reliance, and on which the other party has detrimentally relied on.<sup>576</sup> In addition, the test for pure economic loss is subject to narrow constraints as there is no general duty of care to protect the economic interests of another person.<sup>577</sup>

As a rule, the misrepresentation must be a false statement of fact as opposed to a statement of opinion, a statement of intention, or a mere commendatory statement.<sup>578</sup> However, a representation as to future intention might amount to a fraudulent misrepresentation of fact, if the representor did not intend on fulfilling it at the time of making the representation.<sup>579</sup> This is similar to the obligation not to engage in or continue negotiations without intention to reach agreement under the doctrine of *culpa in contrahendo*.<sup>580</sup> However, while fraud prohibits the provision of inaccurate information, it does not impose upon the parties a duty of information. Absent a contract *uberrimae fidei*, fiduciary duty, or statutory duty to disclose; mere non-

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<sup>572</sup> Chitty on Contracts 2015, paras 7-001, 7-047.

<sup>573</sup> Restatement (Second) of Torts, Article 552; Halsbury's Laws of Canada – Contracts, HCO-123; Halsbury's Laws of Canada – Misrepresentation and Fraud, HMF-37; Queen v Cognos Inc, para 33; Hercules Managements Ltd v Ernst & Young, para 24; Halsbury's Laws of Australia – Contract, Vitiating Factors, paras 110-5160.

<sup>574</sup> Hedley Byrne & Co Ltd v Heller & Partners Ltd. See also Chitty on Contracts 2015, para 7-089. This duty might apply to pre-contractual statements. Esso Petroleum Co Ltd v Mardon. Court of Appeal (Civil Division), [1976] QB 801, 06 February 1976; Henderson v Merrett Syndicates Ltd (No 1). House of Lords, [1995] 2 AC 145, 25 July 1994, p 180. See also Cartwright and Hesselink, p 465.

<sup>575</sup> Chitty on Contracts 2015, para 7-047. See also Mirmina, p 92.

<sup>576</sup> Derry v Peek. House of Lords, [1889] 14 App Cas 337, 01 July 1889; Chitty on Contracts 2015, para 7-047; Halsbury's Laws of Canada – Contracts, HCO-123; Halsbury's Laws of Canada – Misrepresentation and Fraud, HMF-2-3; Halsbury's Laws of Australia, para 415-625; Restatement (Second) of Torts, Article 525.

<sup>577</sup> Bass, p 226.

<sup>578</sup> Chitty on Contracts 2015, para 7-006; Halsbury's Laws of Canada – Contracts, HCO-120.

<sup>579</sup> Halsbury's Laws of Canada – Misrepresentation and Fraud, HMF-3; Galaxy Sports Inc (Re). British Columbia Supreme Court, (2005) BCSC 278, 4 March 2005, para 77; Halsbury's Law of Australia, para 415-625; Restatement (Second) of Torts, Articles 525 and 530(1).

<sup>580</sup> See also Summers 1968, pp 223, 227-228, 257-258; Farnsworth 1987, pp 233-235.

disclosure does not constitute misrepresentation but a failure to correct a prior representation might.<sup>581</sup> Thus, the law of tort lacks the efficiency of *culpa in contrahendo*.

### ***Promissory Estoppel***

Of particular interest for the purposes of the master thesis and also a subject of some controversy is the doctrine of promissory estoppel, i.e. specific promise, falling short of being an offer and usually unenforceable for want of consideration, as a basis for liability. According to N. E. Nedzel, promissory estoppel in Section 90 of the Restatement (Second) of Contracts is one of the main theories relied upon in pre-contractual situations by American common law.<sup>582</sup> Section 90 of the Restatement (Second) of Contracts states:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Thus, a negotiating party may not break a promise made during negotiations if the other party has reasonably relied on it.<sup>583</sup> The often cited case for promissory estoppel in the US is *Hoffman v Red Owl Stores*.<sup>584</sup> The doctrine has also been recognised in Australia in *Waltons Stores (Interstate) Ltd v Maher*.<sup>585</sup> However, apart from recognising proprietary estoppel concerning contracts for the sale of land,<sup>586</sup> English and Canadian law do not recognise promissory estoppel as a sword, i.e. as a cause of action, but only as a shield, i.e. a defence.<sup>587</sup>

Promissory estoppel might protect a negotiating party from the other party engaging in negotiations without a real intention to reach an agreement or from unjustified breaking off of negotiations.<sup>588</sup> The doctrine may also help to bypass formalities, such as the requirement that an agreement be reduced to writing, by allowing enforcement of oral promises in certain

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<sup>581</sup> Chitty on Contracts 2015, para 7-017.

<sup>582</sup> Nedzel, pp 128-137. See also Chitty on Contracts 2015, para 4-107.

<sup>583</sup> Farnsworth 1987, pp 236-237.

<sup>584</sup> *Hoffman v Red Owl Stores Inc.* US Supreme Court of Wisconsin (1965) 26 Wis 2d 683, 2 March 1965.

<sup>585</sup> *Waltons Stores (Interstate) Ltd v Maher*. High Court of Australia, (1988) 76 ALR 513, 19 February 1988, p 554. See also Bass, p 227.

<sup>586</sup> *Crabb v Arun District Council*. Court of Appeal (Civil Division), [1975] 3 WLR 847, 23 July 1975; *Cobbe v Yeoman's Row Management Ltd*. Court of Appeal (Civil Division), EWCA Civ 1139 (CA), 31 July 2006. See also Whittaker and Zimmermann, p 249; Banakas, p 14.

<sup>587</sup> *Combe v Combe*. Court of Appeal, [1951] 2 KB 215, 06 March 1951; *Baird Textile Holdings Ltd v Marks & Spencer Plc.* Court of Appeal (Civil Division), [2001] EWCA Civ 274, 28 February 2001, para 38; *Canadian Superior Oil Ltd v Paddon-Hughes Development Co.* Supreme Court of Canada, (1970) SCR 932, p 937; *Romfo et al v 1216393 Ontario Inc.* British Columbia Supreme Court (2006) BCSC 1648, 8 November 2006, para 246. See also Chitty on Contracts 2015, paras 2-222, 4-107, 4-183; Cartwright, pp 164-165; Halsbury's Law of Canada – Contracts, HCO-58 and HCO-62.

<sup>588</sup> Kessler and Fine, pp 419-420; Summers 1968, pp 223-224; Farnsworth 1987, pp 36-37.

circumstances, e.g. where an inequitable advantage has been taken from the promisee, ‘resulting in unjust enrichment or ‘unconscionable injury’.<sup>589</sup>

However, *Hoffman v Red Owl Stores* has received scant support in the US – its influence has been more marked in the law review than in the law reports<sup>590</sup> and is rarely a successful cause of action.<sup>591</sup> Promissory estoppel is criticised as imprecise and conclusional.<sup>592</sup> It imposes a heavy burden of proof on the promisee that a specific enough promise was made and that it was reasonable to rely on it in the context of the negotiations.<sup>593</sup> Moreover, it is concerned with promises rather than statements exchanged during pre-contractual negotiations.<sup>594</sup> The amount of damages to be awarded is left to the discretion of courts. While expectation damages are not excluded, promissory estoppel compensates reliance damages ‘only to the extent necessary to avoid injustice’.<sup>595</sup> Thus, compensation for out-of-pocket costs arising from the failed negotiations might not be compensable. Inconsistent application of the doctrine might add to the reluctance of courts to grant relief under promissory estoppel.<sup>596</sup> Thus, due to its deficiencies and a lack of universal recognition and application in common law legal systems, the doctrine of promissory estoppel does not provide a generally recognised duty to negotiate in good faith.

## **2.5 Concluding Remarks: Nothing New Under the Sun of International Law**

In previous sections the author has undertaken a comparative study of national legal systems necessary in search for a general principle of law recognised by civilised nations. The author finds that, on the one hand, the duties of good faith contractual performance and of good faith pre-contractual negotiations are generally recognised in the civil law legal tradition, including Germany, France, the Netherlands and other civil law legal systems. On the other hand, the duty of good faith is not universally recognised in the common law legal systems where the freedom of contract strongly prevails. In the US and Canada the duty of good faith contractual performance is implied by law and cannot be excluded but the parties can determine the good faith standards. In English and Australian law the duty can usually only be implied in fact and can, thus, be excluded by express agreement. In all analysed common law legal systems the implied duty of good faith cannot override the parties’ express agreement. Furthermore,

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<sup>589</sup> Kessler and Fine, pp 414-415. See also Nedzel, pp 128-137.

<sup>590</sup> Farnsworth 1987, p 237; Schwartz and Scott, pp 669-670.

<sup>591</sup> Schwartz and Scott, pp 670-672.

<sup>592</sup> Nedzel, p 137.

<sup>593</sup> Farnsworth 1987, p 237.

<sup>594</sup> Mirmina, pp 94-96.

<sup>595</sup> *Ibid*, p 98.

<sup>596</sup> Nedzel, p 157.

common law does not recognise a general duty to negotiate in good faith, i.e. absent an express and clear agreement to that regard.

Acceptance of the principle of good faith in common law in certain contracts *uberrimae fidei* or by limited statutory intervention does not amount to a general recognition of the principle of good faith. Such contracts often reflect the inequality of the negotiating parties. However, in international law, States pursue their own interests and despite the inevitable imbalance of power between States, the sovereign equality of States is recognised. H. Thirlway has urged the need to ‘respect the pattern of relationships’ when transferring rules or principles from domestic law to the international level.<sup>597</sup> Thus, an analogy would not be appropriate here.

Furthermore, while aiming for justice, the piecemeal solutions, such as unjust enrichment, misrepresentation, and promissory estoppel established in common law jurisdictions, are less effective compared to the doctrine of *culpa in contrahendo*. In particular, the informational obligations in common law are much more lenient than in the civil law legal tradition and there is little or no protection against breaking off negotiations.

Therefore, the author of the master thesis is of the opinion that at the moment it is not possible to convincingly deduce a general principle of law as recognised by civilised nations that would provide for a general duty to negotiate in good faith. The clearest common thread between common law and civil law pre-contractual duties is the duty to refrain from fraudulent misrepresentations. However, it usually only provides a remedy in case the negotiations resulted in a contract. Prohibition of fraud is already recognised in international law in Article 49 of the VCLT and as a general principle of law. In contrast to common law, the enforceability of express and clear agreements to negotiate in good faith in international law does not require the existence of consideration<sup>598</sup> and the obligation to perform them in good faith derives from the principle of *pacta sunt servanda*. Therefore, it can be said that there is nothing new under the sun of international law by virtue of Article 38(1)(c) of the ICJ Statute in the context of pre-contractual duties to negotiate in good faith. Hence, the analysis in this chapter confirms the sub-hypothesis that the obligation to negotiate in good faith is not a general principle of law common to domestic legal systems.

It is not necessary and possible to demonstrate transposability to the international level although it has been argued above in section 2.1 that the analogy would be in principle possible and appropriate. Nevertheless, despite a lack of recognition in the common law legal

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<sup>597</sup> Thirlway, pp 238-239, 1203.

<sup>598</sup> *Ibid*, pp 13, 336.



tradition, the strong recognition of the duty to negotiate in good faith in the civil law legal tradition supports the author's conclusion in subsection 1.2.3 that a general obligation to negotiate in good faith exists in customary international law.

### 3 CONSEQUENCES OF A BREACH OF THE OBLIGATION TO NEGOTIATE IN GOOD FAITH

This chapter aims to establish whether and what kind of consequences, in particular, legal consequences, follow a breach of the obligation to negotiate in good faith. The following subsections give an overview of the consequences under the VCLT and the law of State responsibility. Procedural consequences stemming from a breach of the obligation to negotiate disputes as a prerequisite for recourse to judicial settlement are not within the scope of the master thesis.<sup>599</sup>

It has been argued, e.g. by the authors of the Harvard Draft Convention and H. Kelsen, that the principle of good faith is merely a moral principle and, thus, no sanctions, such as duty to make reparation for any losses or damages sustained by the other party, result from the failure to act in accordance with it.<sup>600</sup> Clearly, bad faith conduct during international negotiations has political implications – it might result in a loss of credibility that consequently may lessen the effectiveness of that nation's foreign policies.<sup>601</sup> However, the author of the master thesis has argued that a duty to negotiate in good faith is a legal obligation and its breach results in legal consequences. This is so where the parties are under a conventional or general international law obligation to negotiate or where an agreement to negotiate between the parties is implicit. The legal nature of the duty to negotiate in good faith (VCLT Draft Article 15(a)) was also noted by SR Fitzmaurice and SR Waldock when drafting the VCLT.<sup>602</sup> Thus, the master thesis focuses on legal consequences rather than political.

Judge Lauterpacht has noted that the principle of good faith 'has a very limited practical sphere of operation unless a court is in a position to examine and assess the conduct of the State concerned.' The scope of application is further constricted by evidentiary difficulties and the well-established principle that bad faith is not to be presumed.<sup>603</sup> Nevertheless, action not in good faith is a breach of a general international law obligation, even if it is a breach which is hard to establish and whose consequences may be uncertain.<sup>604</sup> Moreover, 'if a rule is clearly stated [---] conceptually consistent with other generally accepted norms, and applied

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<sup>599</sup> The ICJ has generally not conditioned access to it on active negotiations. However, in the *CERD case* (para 134) it stated that where negotiations are commenced or attempted, the precondition is only satisfied if they have led to an impasse or otherwise failed. See also Brownlie, pp 694, 696. For a recent contribution to the topic see Wellens.

<sup>600</sup> Kelsen, p 89; Harvard Draft Convention, pp 780-781 as referred to in Hassan, pp 445-446, 465.

<sup>601</sup> Hassan, p 445.

<sup>602</sup> See above subsection 1.2.1.2.

<sup>603</sup> E.g. *Tacna-Arica question*, pp 929-930; *Lake Lanoux*, para 9. See also Hassan, p 450; White in Lowe and Warbrick, pp 244, 246.

<sup>604</sup> White in Lowe and Warbrick, p 245.

consistently (or, at the very least, demands for compliance are consistently made), then the rule will exert a pull toward compliance.’<sup>605</sup>

### 3.1 Vienna Convention on the Law of Treaties

A breach of duty to negotiate in good faith might in certain circumstances provide a basis for the termination or suspension of a treaty. Article 60 of the VCLT provides for the termination or suspension of a treaty in case of a material breach by one of the parties.<sup>606</sup> A material breach could be established for example in the case of a failure to enter into negotiations if: ‘(1) the treaty contained an express provision requiring negotiation under certain circumstances; or (2) the treaty created overlapping rights which could only be defined for one party in relation to the rights of the other party or parties even without an express requirement to negotiate.’<sup>607</sup>

Absent a conventional or general international law based obligation to negotiate, which must be performed in good faith according to the principle of *pacta sunt servanda*, VCLT regulates States’ conduct during pre-contractual negotiations only to a limited extent. Clearest manifestations of bad faith conduct prohibited by the VCLT during treaty negotiations are fraud, corruption, and coercion (Articles 49-52 of the VCLT) as grounds for invalidating a treaty or the consent of a State to be bound by a treaty.

A defrauded State may invoke fraud in Article 49 and a State whose representative has been corrupted may invoke corruption in Article 50 as invalidating its consent to be bound by a treaty. Thus, the consent is not *ipso facto* void but only voidable. In contrast, an expression of a State’s consent to be bound procured by coercion of its representative is according to Article 51 without any legal effect, i.e. it is *ipso facto* and absolutely void. The defrauded or corrupted State may choose whether to invoke fraud or corruption with respect to a separable clause affected or the entire treaty. In cases of coercion of a State representative, the invalidity of consent may only be invoked with regard to the whole treaty.

According to Article 52 a treaty the conclusion of which has been procured by the illegal threat or use of force is entirely void, i.e. it has no legal force by virtue of law from the outset.

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<sup>605</sup> *Ibid*, p 173.

<sup>606</sup> *Ibid*, p 175.

<sup>607</sup> *Ibid*.

Thus, the principle of *pacta sunt servanda* is not applicable. However, the treaty is presumed valid until its voidness is established.<sup>608</sup>

In all cases, the invalidity must be invoked or established in accordance with the procedure set forth in Article 65-68 of the VCLT. In cases of fraud and corruption, the invalidity may only be invoked by the directly affected State, in cases of coercion of a State representative any party to the treaty except for the coercing State may invoke the invalidity of the consent. The invoking State must notify the other State parties of its claim in writing indicating a measure to be taken with respect to the treaty and the reasons thereof (ARSIWA Articles 65(1) and 67(1). If no party objects, the invoking State may declare the treaty invalid through an instrument communicated to the other parties (ARSIWA Articles 65(2) and 67(2)).

If objection has been raised by any other party, the parties must resort to peaceful means of dispute settlement as indicated in Article 33 of the UN Charter (ARSIWA Article 65(3)). If the parties are nevertheless unable to find a solution, Article 66 will apply. The burden of proof is with the State claiming voidness.<sup>609</sup> Thus, under the VCLT, the aggrieved State cannot release itself from its treaty obligations unilaterally.<sup>610</sup> According to Article 45 of the VCLT the State loses the right to invoke fraud and corruption as the grounds for invalidating a treaty if it has expressly agreed to the treaty's validity or must by reason of its conduct be considered as having acquiesced in its validity.

Article 69 sets out the consequences of the invalidity of a treaty. If the invalidity is successfully established the State's consent is void from the outset. In cases of fraud, corruption, coercion, and illegal use of force each party, except for the 'infringing' party may require any other party to restore as far as possible the *status quo ante*. Nevertheless, acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason of the invalidity of the treaty.

According to Article 42(1) the list of grounds in Articles 46-53 for invalidating State's consent to be bound by a treaty is exhaustive.<sup>611</sup> However, based on Article 31(3)(c) Klabbers argues that additional grounds of invalidity cannot be ruled out.<sup>612</sup> An example of such additional grounds could be economic and political duress, which does not amount to use of force. However, a discussion of the feasibility of additional grounds of invalidity is out of the

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<sup>608</sup> Schmalenbach in Dörr and Schmalenbach, VCLT Article 52/42-46.

<sup>609</sup> *Ibid*, VCLT Article 52/51.

<sup>610</sup> K. Odendahl in Dörr and Schmalenbach, VCLT Article 42/26.

<sup>611</sup> *Ibid*, VCLT Article 42/1, 17.

<sup>612</sup> Klabbers in Hollis, pp 559-561.

scope of the master thesis. Other cases of bad faith conduct during contract negotiations rather obstruct reaching an agreement.

In conclusion, the VCLT allows terminating or suspending a treaty in case a breach of the obligation to negotiate amounts to a material breach. In cases of fraud, corruption, coercion, and illegal use of force a treaty may be rendered invalid. Nevertheless, according to Article 73 of the VCLT its provisions are without prejudice to any questions that may arise in regard to a treaty from the international responsibility of a State. The rules of State responsibility are complementary to the VCLT.<sup>613</sup> Thus, the instances of bad faith discussed in this subsection may also be remedied under the law of State responsibility. Moreover, in most cases bad faith conduct during contract negotiations obstructs the conclusion of a treaty, and there is no treaty breached or to invalidate. According to the preamble of the VCLT, the rules of customary international law will continue to govern questions not regulated by the provisions of the VCLT. Thus, in such cases, the injured State can have recourse to remedies under the law of state responsibility.

### **3.2 Law of State Responsibility**

The rules on State responsibility, which are part of the customary international law,<sup>614</sup> regulate the conditions and consequences for holding a State responsible for attributable violations of their international legal obligations. According to Article 1 of the ARSIWA '[e]very internationally wrongful act of a State entails the international responsibility of that State.' Article 2 prescribes the elements of an internationally wrongful act or omission: 1) attributability to the State under international law; and 2) breach of an international obligation of the State.

There is little doubt that conduct during international negotiations between States is attributable to a State. States have the capacity to conclude treaties and are represented during the negotiations by Heads of State, Heads of Government, Ministers for Foreign Affairs, heads of diplomatic missions, representatives accredited to an international conference, or persons reproducing full powers. Thus, the conduct of State representatives during negotiations is attributable to the State under Articles 4 or 5 of the ARSIWA.

According to Article 12 of the ARSIWA '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that

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<sup>613</sup> H. Krieger in Dörr and Schmalenbach, VCLT Article 73/33.

<sup>614</sup> *Factory at Chorzów*; Krieger in Dörr and Schmalenbach, VCLT Article 73/24-25.

obligations, regardless of its origin or character.’ International law does not distinguish between contractual and tortious liability.<sup>615</sup> Substantive obligations and procedural obligations, such as the obligation to negotiate in good faith, are treated in the same manner for the purposes of establishing responsibility.<sup>616</sup> Responsibility is not predicated on the subjective fault of the State, unless the primary obligation requires fault or intent,<sup>617</sup> which is the case for establishing some instances of bad faith conduct, in particular, fraud; but not necessarily an abuse of right.<sup>618</sup>

Fraud, corruption, coercion, and use of force as grounds of invalidity in the VCLT and also being either general principles of law or rules of customary international law constitute internationally wrongful acts.<sup>619</sup> The obligation to negotiate in good faith is an international legal obligation having either an express conventional or general international law basis or resulting from an implicit agreement to negotiate between States. Moreover, an obligation to negotiate in good faith is a rule of customary international law. Thus, breaching the obligation to negotiate in good faith is a breach of an international obligation, unless the wrongfulness is precluded by the circumstances precluding wrongfulness, such as consent, self-defence, countermeasures, force majeure, distress, or necessity (ARSIWA Articles 20-25).

The responsibility of a State can be invoked by the State to whom the obligation breached was individually owed to or also by other specifically affected States if the obligation breached was of an *erga omnes partes* or *erga omnes* character (the ‘injured State’) (ARSIWA Article 42). The invoking State must give notice of its claim to the responsible State and may specify in particular the conduct that the responsible State should take in order to cease the wrongful act if it is continuing, and what form should reparation take (ARSIWA Article 43). The admissibility of claims might be restricted by the rules relating to the nationality of claims and exhaustion of legal remedies (ARSIWA Article 44). The right to invoke responsibility is lost if the injured State has validly waived the claim or is to be considered validly acquiesced in the lapse of the claim (ARSIWA Article 45).

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<sup>615</sup> *Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the ‘Rainbow Warrior’ Affair (New Zealand v France)* (1990) 20 RIAA 217, para 75; Krieger in Dörr and Schmalenbach, VCLT Article 73/30.

<sup>616</sup> J. Crawford. *State Responsibility. The General Part*. New York: Cambridge University Press 2013, p 232.

<sup>617</sup> Crawford, p 219.

<sup>618</sup> G. Fitzmaurice. *The Law and Procedure of the International Court of Justice, 1954-59: General Principles and Sources of International Law*. – *British Yearbook of International Law* 1959/35, pp 208-209; Goodwin-Gill in Fitzmaurice and Sarooshi, p 95.

<sup>619</sup> Krieger in Dörr and Schmalenbach, VCLT Article 73/31.

If a State violates a treaty, e.g. an express agreement to negotiate in good faith or an obligation to negotiate inherent in the treaty regime, the injured State may, on the one hand, rely on the remedies under the VCLT and, on the other hand, as is also the case for breach of other international legal obligations, avail itself of the remedies under the law of State responsibility. The latter include the continued duty of performance, cessation of the wrongful act, assurances and guarantees of non-repetition as well as reparation (ARSIWA Articles 29-31). If the obligation is of an *erga omnes partes* or *erga omnes* character, other than injured States are entitled to invoke responsibility in the interest of the international community where collective goods or the common welfare is concerned<sup>620</sup> but their claims are limited to cessation, assurances and guarantees of non-repetition, and performance of the obligation of reparation (ARSIWA Article 48).

If a State has breached the obligation to negotiate in good faith, the continued duty of performance under the law of state responsibility requires the State to undertake and/or continue negotiations in good faith, the content of which is described in section 1 of the master thesis. An obligation to cease the act, if it is continuing, and offer appropriate assurances and guarantees of non-repetition, if circumstances so require, depends on the circumstances of the case and the exact conduct of the ‘infringing’ State. For example, the ‘infringing’ State might be required to cease acts frustrating the purposes of the negotiations and abusing its rights, e.g. by interrupting communications or causing delays that obstruct the negotiations.

The obligation of good faith does not require actual damage; its violation might be ‘demonstrated by acts and failures to act which, taken together, render the fulfilment of specific treaty obligations remote or impossible.’<sup>621</sup> However, if the injured State has sustained damage, whether material or moral, due to the breach of the duty to negotiate in good faith, the responsible State is under an obligation to make full reparation including restitution in kind, compensation, and satisfaction for the injury caused by the internationally wrongful act. Restitution means re-establishing the situation which existed before the wrongful act was committed, provided and to the extent that restitution is not materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. In cases of fraud, corruption, coercion, and illegal use of force, the *ex tunc* invalidity of the concluded treaty, is part of restitution. If the negotiations

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<sup>620</sup> Krieger in Dörr and Schmalenbach, VCLT Article 73/27.

<sup>621</sup> Goodwin-Gill in Fitzmaurice and Sarooshi, p 84.

fail due to the responsible State engaging in acts frustrating the purposes of the negotiations or abusing its rights it must re-establish the situation prior to these acts.

Insofar as damage is not made good by restitution, the responsible State is under an obligation to compensate for the damage caused. Compensation shall cover any financially assessable damage. For example, the State responsible for prematurely breaking off negotiations might have to compensate an injured State's investments taken reasonably in reliance on the envisaged agreement but rendered futile due to not reaching an agreement. In addition, a State responsible, for fraud, corruption, or for not showing up to the negotiating table could be liable for compensating costs the injured State undertook to organise, participate in, and prepare the negotiations, including administrative and legal costs. Compensation should cover the loss of profits insofar as it is established, for example if the envisaged agreement was for a profitable cooperation project. Insofar as the injury cannot be made good by restitution or compensation, the responsible State is under an obligation to give satisfaction that may consist in an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality (ARSIWA Article 37).

In addition, if the responsible State has breached a treaty obligation, e.g. an express agreement to negotiate, a customary international law duty to negotiate in good faith, or refuses cessation or reparation, the injured State is entitled to take countermeasures against the responsible State to induce that State to comply with its obligations (ARSIWA Articles 49 and 22). Countermeasures may be taken in accordance with the requirements set forth in Articles 49-53 of the ARSIWA, in particular, the requirement of proportionality. Thus, the injured State may be excused from certain corresponding obligations with respect to the responsible State, the non-performance of which would otherwise amount to an internationally wrongful act.<sup>622</sup> In the case of express agreements to negotiate the corresponding obligations might arise from the treaty containing the express agreement to negotiate itself but the ARSIWA does not preclude non-performance of other international obligations, except for those listed in Article 50 of the ARSIWA, as a countermeasure.

In conclusion, a breach of the duty to negotiate in good faith under the law of state responsibility results in the obligations of continued performance of the duty to negotiate in good faith, cessation and non-repetition of bad faith conduct during negotiations, reparation for injury, including by way of restitution, compensation, and satisfaction. In addition the

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<sup>622</sup> See also Rogoff, p 175.



injured State is entitled to take countermeasures in order to induce the responsible State to compliance.

### 3.3 Consequences of a Possible Breach of the Nuclear Non-proliferation Treaty

By way of an example, this section of the master thesis aims to analyse the consequences of an express agreement to negotiate in good faith, namely Article VI of the NPT, which provides:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

In the *Nuclear Weapons* advisory opinion the ICJ unanimously considered Article VI of the NPT a *pactum de contrahendo*.<sup>623</sup> Interpreting its decision in *Continental Shelf (Tunisia v Libya)* the ICJ has held that a *pactum de contrahendo* by which the parties undertake to conclude a treaty, entails even a stronger obligation to conduct negotiations in a meaningful way compared to mere *pactum de negotiando*.<sup>624</sup> Has the obligation in Article VI been breached and what would be the consequences resulting from it?

On 24 April 2014, the Marshall Islands filed an application to the ICJ instituting proceedings against the United Kingdom, India, and Pakistan.<sup>625</sup> The Marshall Islands contends that

by not actively pursuing negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and instead engaging in conduct that directly conflicts with those legally binding commitments, the Respondent has breached and continues to breach its legal duty to perform its obligations under the NPT and customary international law in good faith.<sup>626</sup>

The high participation rate and numerous UNGA resolutions regarding nuclear disarmament support the position that the obligation in Article VI enjoys customary international law status as a basis for the claim against India and Pakistan, which have not ratified the NPT.

Indeed, after nine review conferences of the NPT, there is no treaty on general and complete nuclear disarmament while some measures have been taken with regard to cessation of the

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<sup>623</sup> *Nuclear Weapons Advisory Opinion*, para 99.

<sup>624</sup> *Continental Shelf (Tunisia v Libya) Interpretation*, paras 48, 67.

<sup>625</sup> Applications were also brought against the US, Russia, China, France, Israel and North Korea which, however, do not accept the 'compulsory jurisdiction' of the ICJ and ignored the cases brought against them.

<sup>626</sup> General Assembly. Report of the International Court of Justice (1 August 2014 - 31 July 2015). UN Doc A/70/4. – [http://www.icj-cij.org/court/en/reports/report\\_2014-2015.pdf](http://www.icj-cij.org/court/en/reports/report_2014-2015.pdf) (29 April 2016), paras 218-219.

nuclear arms race. In 1996, the Comprehensive Nuclear-Test-Ban Treaty (CTBT) was signed but even this has yet to enter into force, as entry into force is lingering upon signature and ratification by India, North Korea and Pakistan and ratification by China, Egypt, Iran, Israel and the United States.<sup>627</sup> After opening the CTBT's for signature, India and Pakistan tested nuclear weapons in 1998, and North Korea has carried out numerous tests.<sup>628</sup> As there is no obligation to ratify a treaty, the non-ratification does not constitute bad faith. However, the signatory states are under an obligation not to defeat the object and purpose of the treaty (Article 18 VCLT). In any event, this treaty does not provide for general and complete nuclear disarmament. As a *pactum de contrahendo* the obligation is an obligation of result and since there is no treaty on general and nuclear disarmament it is a breach of international law by omission.

The ICJ's decision that Article VI of the NPT is a *pactum de contrahendo* has been criticised although the provision sets a clear goal, which is supported by the preamble of the NPT. Nevertheless, the obligation to reach an agreement entails also the (procedural) obligation to negotiate in good faith a breach of which cannot be assessed merely on the basis of a lacking result. While during the Cold War the development of international law in general largely stood still, there have not been many improvements after the end of Cold War. Besides the review conferences of the NPT, there have been no proper negotiations between States regarding nuclear disarmament.

In 2012 the UNGA, at the initiative of Austria, Mexico and Norway, established a UN Open Ended Working Group (OEWG) on nuclear disarmament to develop proposals to take forward multilateral nuclear disarmament negotiations.<sup>629</sup> United Kingdom voted against this resolution, India and Pakistan abstained.<sup>630</sup> Thus, the UK has expressed its unwillingness to negotiate upon the matter. Moreover, India and Pakistan have tested nuclear weapons, and allegedly, the UK is improving its nuclear weapons as well. These activities run counter to the object of general and complete nuclear disarmament, i.e. they frustrate the object of the 'desired' treaty, and should negotiations be undertaken, also the purpose of the negotiations.

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<sup>627</sup> Comprehensive Nuclear-Test-Ban Treaty. Opened for signature 24 September 1996 (not yet in force).

<sup>628</sup> North-Korea withdrew in 2003. See Nuclear Threat Initiative. North-Korea (April 2016). – <http://www.nti.org/learn/countries/north-korea/nuclear/> (29 April 2016).

<sup>629</sup> UNGA Res 67/56 (4 January 2013) UN Doc A/RES/67/56.

<sup>630</sup> United Nations. Voting Summary for UNGA Res 67/56. United Nations Bibliographic Information System. – <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares6756> (29 April 2016).

In October 2015, a resolution was adopted to establish a second OEWG to address concrete effective legal measures, legal provisions, and norms that will need to be concluded.<sup>631</sup> The establishment of the OEWG, which was also recommended in the Final Draft Document of the 2015 NPT Review Conference, was opposed by the permanent members, belonging also to the nuclear weapon states, of the UN Security Council: China, France, Russia, the United Kingdom, and the United States. In December 2015, the UNGA adopted among other resolutions concerning nuclear weapons resolutions on ‘Nuclear Disarmament’ and ‘Towards a nuclear-weapon-free world: accelerating the implementation of nuclear disarmament commitments’.<sup>632</sup> With regard to the first, the UK voted against, and India and Pakistan abstained. With regard to the latter, the UK and India voted against, and Pakistan abstained. Thus, there it seems that there is continuous unwillingness to commence negotiations on nuclear disarmament on the part of these States.

The public hearings at the ICJ on jurisdiction and admissibility in the proceedings brought by the Marshall Islands were preceded by the OEWG’s first meeting in February 2016 in Geneva, which did not succeed in breaking the stalemate on nuclear weapons disarmament.<sup>633</sup> The ICJ is yet to decide on jurisdiction and admissibility. However, leaving the questions of jurisdiction and admissibility aside, since no negotiations have been undertaken and no treaty on nuclear disarmament reached, there appears to be a breach of Article VI of the NPT by way of omission, i.e. failure to start negotiations, but also due to the activities frustrating the object, i.e. nuclear disarmament. As nuclear weapons mostly serve the aim of deterrence, it is difficult to imagine the applicability of any of the circumstances precluding wrongfulness, in particular, self-defence, necessity, or countermeasures. States that have voted for the relevant UNGA resolutions cannot also be presumed to have validly consented to such omissions. Thus, no circumstances precluding wrongfulness seem to apply.

The above mentioned activities, i.e. the testing and improvement of nuclear weapons, frustrate the object of nuclear disarmament and are presumably attributable to the UK, India and Pakistan, e.g. as a result of the activities being carried out under State directions and control. Since States have the capacity to conclude treaties, the omission to commence negotiations is also attributable to States. However, the omission is attributable not only to the UK, India, and Pakistan, but several other States party to the NPT, who, for example, have also expressed unwillingness regarding nuclear disarmament negotiations by way of voting against relevant

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<sup>631</sup> UNGA Draft Res A/C.1/70/L.13/Rev.1 (29 October 2015) UN Doc A/C.1/70/L.13/Rev.1.

<sup>632</sup> UNGA Res A/RES/70/51 (11 December 2015) UN Doc A/RES/70/51; UNGA Res A/RES/70/52 (11 December 2015) UN Doc A/RES/70/52.

<sup>633</sup> The next two sessions are scheduled for May and August.

UNGA resolutions and thereby delaying and obstructing the commencement of negotiations. Nevertheless, according to Article 47 of the VCLT '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.'

The obligation to negotiate in good faith under Article VI of the NPT is owed to States party to the NPT and possibly to the international community as a whole by way of customary international law. It is an obligation *erga omnes*<sup>634</sup> as nuclear disarmament concerns the common welfare. Thus, all States (parties to the NPT) but, in particular, the non-nuclear States who in the NPT have undertaken not to acquire nuclear weapons (NPT Article 2) in expectation of negotiations on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament treaty, are specifically affected by the breach of Article VI of the NPT. According to Article 46 of the ARSIWA, in such cases, each injured State may separately invoke the responsibility of the 'infringing' State. The injured State may invoke the responsibility in accordance with Articles 46-53 of the ARSIWA and ask the State to:

- 1) to adhere to the obligation to negotiate in good faith on effective measures relating to cessation of the nuclear arms race and on a treaty on nuclear disarmament, i.e. to commence and continue such negotiations in good faith in a meaningful way;
- 2) to cease activities frustrating the object of cessation of nuclear arms race and nuclear disarmament, such as manufacture, improvement, development, and testing nuclear weapons, and to offer appropriate assurance and guarantees of non-repetition;
- 3) to make full reparation for the injury caused by the internationally wrongful act:
  - a. in particular to restore the situation *ex ante*, i.e. to destroy any newly acquired nuclear weapons, and improvements made thereto;
  - b. to compensate any financially assessable damage caused to the injured State and not made good by restitution;
  - c. insofar as the injury cannot be made good by restitution or compensation, to give satisfaction for the injury caused, e.g. by acknowledging the breach, expressing regret, or formally apologising.

In addition, the injured State is entitled to take countermeasures against the responsible State(s) in order to induce the State(s) to compliance and may thus be excused from non-

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<sup>634</sup> *Barcelona Traction*, para 33.

performance of its own international legal obligations. Unfortunately, as the compulsory jurisdiction of the ICJ is rather an exception than a rule, countermeasures might also be the only way of invoking responsibility of the 'infringing' State if the latter does not admit responsibility in the course of negotiations.<sup>635</sup> However, due to power imbalances smaller States might have scarce possibilities to successfully implement countermeasures.<sup>636</sup>

Countermeasures are subject to the requirement of proportionality and it would not be proportional for the injured State to breach its obligations under Article II of the NPT, i.e. to start acquiring nuclear weapons. However, Article VI of the NPT is a provision essential to the accomplishment of the purpose of the treaty, the breach of which might amount to a material breach and, thus, provide grounds for its termination or suspension of its operation according to Article 60 of the VCLT. However, this would be an undesirable consequence for the whole international community. Since the obligation in Article VI of the NPT is of an *erga omnes* character, the responsibility may also be invoked by non-injured State(s) but the claims are limited to cessation, assurances and guarantees of non-repetition, and performance of the obligation of reparation.

In conclusion, Article VI of the NPT has not been adhered to – no nuclear disarmament negotiations have been commenced, and no nuclear disarmament treaty concluded within 46 years from the entry into force of the NPT. Considering the ICJ's opinion in the *Nuclear Weapons Advisory Opinion* that the obligation in Article VI of the NPT is a *pactum de contrahendo* it is likely that the ICJ would find a breach of international law. However, it remains to be seen whether the ICJ can overcome the jurisdictional and admissibility issues in order to decide on the merits of the case brought to it by the Marshall Islands. The enforcement of an obligation to negotiate in good faith in a multilateral treaty by the decision of the ICJ would nevertheless be problematic as the decision is binding only to the parties to the dispute. Thus, due to the lack of effective enforcement mechanisms in international law, the lack of political willingness to negotiate a treaty on nuclear disarmament might render Article VI of the NPT devoid of legal effect. This should, however, not mean that a duty to negotiate in good faith in international law is unnecessary. A clearly stated rule, compliance with which is consistently demanded, and the clearly stated consequences of a breach thereof will exert a pull towards compliance.<sup>637</sup> Therefore, in theory and by way of example the sub-hypothesis that a breach of the obligation to negotiate in good faith entails legal consequences has been confirmed.

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<sup>635</sup> L. Mälksoo. Rahvusvahelise Õiguse Komisjoni töomailt. – Juridica 2001/VI, p 419.

<sup>636</sup> *Ibid.*

<sup>637</sup> Rogoff, p 173.

## Conclusion

The master thesis analysed whether in international law States are under a legal obligation to negotiate in good faith, the source and essence of such obligation, and the legal consequences of a breach thereof. The analysis confirmed the author's main hypothesis that in international law all negotiating States are under a general legal obligation to negotiate in good faith and that a breach of the obligation entails legal consequences. The exact content of the obligation to negotiate in good faith depends on the circumstances of each particular case but a non-exhaustive list of obligations is provided in section 1.3.

More specifically, the author concludes that where there is an express agreement to negotiate, whether or not qualified by the words 'in good faith', it is to be performed in good faith according to the principle of *pacta sunt servanda* enshrined also in Article 26 of the VCLT. The obligation to negotiate might implicitly arise from the nature of the specific international law regime itself, such as maritime delimitation, and, thus, States are to perform the obligation in good faith in accordance with Article 2(2) of the UN Charter. By virtue of Article 2(2) and (3) of the UN Charter the principle of good faith also extends to the peaceful settlement of disputes by way of negotiations.

The VCLT – the main international legal instrument regulating the conclusion of treaties, prohibits limited instances of bad faith conduct during treaty negotiations by virtue of the grounds of invalidity such as fraud, corruption, coercion, and illegal threat or use of force. Fraud and corruption are also general principles of law recognised by civilised nations while coercion and illegal use of force are prohibited under customary international law. However, extending the obligation not to frustrate the object and purpose of a treaty in Article 18 of the VCLT to the negotiating stage contradicts the text of the provision and intentions of the States party to the VCLT. Thus, the sub-hypothesis that in international treaty law the obligation to negotiate in good faith is recognised only to a limited extent was proved.

The principles that States are required to negotiate in good faith and must refrain from any conduct which might undermine the negotiations are stated in the non-binding UNGA resolution 53/101 'Principles and guidelines for international negotiations'. The author of the master thesis argues that the principles of the resolution are customary international law as evidenced by State practice and *opinio juris*, including the domestic private law rules of the civil law legal systems, and as assessed in the relevant circumstances and the wider legal framework. The resolution was adopted without a vote and no reservations have been made to it. The customary law nature of the principle of sovereign equality of all States, duty of non-

intervention in domestic matters, (*p*)*acta sunt servanda* rule, prohibition of the threat or use of force and the invalidating effect of coercion on treaties, duty to cooperate in international relations, and duty to settle disputes peacefully spills over to the obligation to negotiate in good faith. In addition, the good faith requirement in the context of negotiations is confirmed and substantiated in the case law of the international courts. The analysis supported the sub-hypothesis that the obligation to negotiate in good faith has developed into a norm of customary international law.

To complete the analysis of international law and its sources and to ascertain whether the obligation to negotiate in good faith is a general principle common to domestic legal systems, the author of the master thesis undertook a comparative analysis of the domestic private law rules on pre-contractual liability in the civil law and common law legal traditions. The representative sample legal systems were German, French, and Dutch law in the civil law tradition and English, the United States, Australian, and Canadian law in the common law tradition. The author came to the conclusion that a general obligation to negotiate in good faith could not be convincingly derived from the domestic legal systems, and thus confirmed the relevant sub-hypothesis.

On the one hand, the obligation to negotiate in good faith is generally recognised in the civil law legal systems as developed in the court practice and/or by way of express provisions in the codes. On the other hand, in the common law legal systems there is strong emphasis on the freedom of contract and the adversarial nature of commercial negotiations, which has resulted in express reluctance to extend the principle of good faith to the negotiating stage absent an express and clear agreement to that regard or a specific relationship *uberrimae fidei* where an imbalance of power is often inherent. In the latter case, analogy would not be appropriate as in international law the equality of States is recognised despite the power imbalances that exist. The piecemeal solutions developed in common law to address unfairness are not universally recognised, consistently applied, or as efficient as the doctrine of *culpa in contrahendo* in the civil law tradition. Therefore, a general obligation to negotiate in good faith is not a general principle of law recognised by civilised nations.

Nevertheless, the author argues that in international law the principle of good faith applies to all negotiations even when undertaken voluntarily, i.e. lacking an express agreement to that regard or an obligation inherent in the specific regime of international law. In principle, States are under no obligation to negotiate with other States but they are also not to abuse their sovereign right to negotiate. Where States have undertaken negotiations, their conduct and

communications prior to the negotiations have culminated in an implied agreement to negotiate to which the principle of good faith applies. Although conflicting interests are inherent in all negotiations, it would be unreasonable to require them to crystallise into a dispute for the principle of good faith to apply.

In general, the obligation to negotiate in good faith requires States to enter into negotiations and pursue them, as far as possible, with a view to concluding agreements; to negotiate in a meaningful way, being willing to compromise; to pay reasonable regard to the interests of the other; to refrain from fraud, corruption, coercion, and illegal use or threat of force; and to refrain from acts frustrating the object and purpose of negotiations.

A breach of the duty to negotiate in good faith would entail legal consequences under the VCLT and the law of State responsibility. In case an express agreement to negotiate has been breached, the breach might well amount to a material breach justifying the termination or suspension of the treaty under the VCLT. In cases of fraud, corruption, coercion, and illegal use of force, the injured State may invoke the invalidity of the treaty and, if successful, claim restitution of the situation *ex ante*. As the law of State responsibility is complementary to the VCLT, the injured States are also entitled to remedies under the law of State responsibility. Moreover, such remedies are the only possible recourse in case the negotiations have been unsuccessful and not resulted in the conclusion of a treaty.

The remedies under the law of States responsibility are obligations of continued performance of the duty to negotiate in good faith, cessation and non-repetition of bad faith conduct during negotiations, reparation for injury, including by way of restitution, compensation, and satisfaction. In addition, if the responsible State has breached a treaty obligation, e.g. an express agreement to negotiate, a customary international law duty to negotiate in good faith, or refuses cessation or reparation, the injured State is entitled to take countermeasures against the responsible State to induce that State to comply with its obligations.

By way of an example, the master thesis analysed a possible breach of an express agreement in Article VI of the NPT to negotiate in good faith on effective measures on the cessation of the nuclear arms race and on a treaty on nuclear disarmament, an issue which is currently also on the agenda of the ICJ in claims brought by Marshall Islands against the UK, India and Pakistan. The ICJ in the *Nuclear Tests* advisory opinion has held this obligation to be a *pactum de contrahendo*, not only a mere *pactum de negotiando*, and therefore, the obligation to negotiate in good faith, i.e. in a meaningful way, is even stronger. If the obligation is a *pactum de contrahendo*, i.e. an obligation of result, its breach is manifested by the mere fact



that after 46 years of the entry into force of the NPT there is still no treaty on nuclear disarmament. Since States have the capacity to conclude treaties it is a breach attributable to all States (parties to the NPT).

Regarding the obligation to negotiate in good faith, some States, such as the UK, India and Pakistan, have by improving and testing their nuclear weapons not acted in good faith, i.e. they have acted in a way that undermines the object of the desired treaty on nuclear disarmament and, if negotiations had been undertaken, also the purpose of the negotiations. By voting against relevant UNGA resolutions, they have obstructed the commencement of negotiations on nuclear disarmament and expressed their unwillingness to negotiate. Leaving issues of admissibility and jurisdiction aside, the author of the master thesis is of the opinion that the ICJ would find a breach of international law entailing with it legal consequences both under the VCLT and the law of State responsibility. Even so, the enforcement of the decision would be problematic as the decision is binding only to the parties to the dispute. Thus, due to the lack of effective enforcement mechanisms in international law, the lack of political willingness to negotiate a treaty on nuclear disarmament might render Article VI of the NPT devoid of legal effect. This should, however, not mean that a duty to negotiate in good faith in international law is unnecessary.

An obligation to negotiate in good faith is a prerequisite for successful negotiations – it enhances the predictability of negotiating parties by reducing uncertainty and promoting an atmosphere of trust at negotiations. A clearly stated rule leaves less room for differing interpretations and provides legal clarity for States regarding their rights and obligations when conducting or breaking off negotiations. Moreover, it safeguards the legitimate rights of smaller or less powerful States in negotiations at both the bilateral and multilateral levels. A clearly stated rule, which is consistently applied or compliance with which is consistently demanded, with clearly stated consequences of a breach thereof, will exert a pull towards compliance, i.e. prevent States from conducting negotiations in bad faith and abusing their rights and bargaining power.

## **Lepingueelsete läbirääkimiste heauskse pidamise kohustus ja selle rikkumise tagajärjed rahvusvahelises õiguses**

### **Resümee**

Läbirääkimised on rahvusvaheliste suhete lahutamatuks osaks. Need on enim kasutatav ja tõhusaim meede riikidevahelise koostöö edendamiseks. Rahvusvahelisel tasandil on läbirääkimiste protsess suuresti õiguslikult reguleerimata. Väidetakse, et hea usu põhimõte on rahvusvahelise õiguse aluspõhimõte ja kohaldub seega ka rahvusvahelistele läbirääkimistele. Teisalt on Rahvusvaheline Kohus rõhutanud, et hea usu põhimõte seondub vaid olemasolevate kohustuste täitmisega. Oma olemuselt on läbirääkimised aga vabatahtlikud – riikidel on suveräänsusest tulenev õigus, mitte kohustus läbirääkimisi pidada.

Moraalse käitumisjuhisenä kohaldub hea usu põhimõte kõikidele rahvusvahelistele läbirääkimistele. Käesoleva magistritöö keskseks küsimuseks on, kas sellest tuleneb ka õiguslik kohustus, mille rikkumisega kaasnevad õiguslikud tagajärjed. Magistritöö eesmärgiks on analüüsida, kas rahvusvahelises õiguses on riikidel kohustus pidada läbirääkimisi heas usus, mis on sellise kohustuse allikas ja olemus ning millised tagajärjed toob kaasa selle kohustuse rikkumine. Rahvusvahelise õiguse allikad on loetletud Rahvusvahelise Kohtu statuudi artikli 38 esimeses lõikes: rahvusvahelised konventsioonid, rahvusvaheline tava, õiguse üldprintsiibid, mida tunnustavad tsiviliseeritud rahvad, ning abistavate allikadena kohtuotsused ja õigusteadlaste õpetused.

Sellest tulenevalt on uurimisküsimusele vastamiseks vaja vastata järgnevatele alaküsimustele: kas ja mil määral tuleneb lepingueelsete läbirääkimiste heauskse pidamise kohustus rahvusvahelisest lepinguõigusest; kas ja mil määral tuleneb lepingueelsete läbirääkimiste heauskse pidamise kohustus rahvusvahelisest tavaõigusest; kas lepingueelsete läbirääkimiste heauskse pidamise kohustus on siseriiklikes õigussüsteemides tunnustatud õiguse üldpõhimõte; kas lepingueelsete läbirääkimiste heauskse pidamise kohustus kohaldub kõigile riikidevahelistele läbirääkimistele; kuidas on lepingueelsete läbirääkimiste heauskse pidamise kohustus sisustatud; kas ja millised on kohustuse rikkumise tagajärjed.

Lepingueelsete läbirääkimiste heauskse pidamise kohustus on edukate läbirääkimiste eelduseks, suurendades etteaimatavust, vähendades määramatust ning soodustades usalduslikku õhkkonda. Lepingueelsete läbirääkimiste heauskse pidamise kohustuse sisu analüüs suurendaks õigusselgust riikide õiguste ja kohustuste osas läbirääkimiste pidamisel

või katkestamisel. Veelgi enam, see aitaks kaitsta väiksemate riikide nagu Eesti huve ja positsiooni rahvusvahelistel läbirääkimistel.

Riigid ei peaks kartma tugineda oma õigustele, kui vastaspool on rikkunud oma kohustust läbirääkimisi heauskselt pidada. Teisalt soodustab selge õigusnormi olemasolu ja järjepidev rakendamine normist kinnipidamist. Läbirääkimiste heauskse pidamise kohustuse eesmärgiks on tagada rahvusvaheliste suhete stabiilsus ja ühiskonna heaolu, vältides ettearvamatuid kahjusid. Kohustus on eriti oluline kiireloomulistes küsimustes nagu näiteks rahuläbirääkimised.

Tänapäeval on lepingueelsete läbirääkimiste heauskse pidamise kohustus erilise tähtsusega, sest läbiräägitavad teemad on muutunud üha keerulisemaks ja sageli on mitmed läbirääkimised omavahel põimunud. Riikide käitumine ning läbirääkimiste tulemused võivad avaldada olulist mõju nii läbirääkivate riikide suhetele kui ka suhetele teiste riikidega. Üha enam toimuvad läbirääkimised riikide ja paremal läbirääkimiste positsioonil olevate rahvusvaheliste organisatsioonide vahel. Kuigi käesolev töö käsitleb vaid riikidevahelisi läbirääkimisi, võiks kõnealune kohustus laieneda ka rahvusvahelistele organisatsioonidele.

Läbirääkimiste heauskse pidamise kohustus ei ole vaid teoreetiline probleem – see on olnud ja on hetkelgi rahvusvaheliste kohtute päevakorras. Näiteks on Alalise Vahekohtu menetluses kohtuasi, kus Timor-Leste püüab tühistada väidetavalt pettuse teel Austraaliaga sõlmitud lepingut. Teise näitena on Marshalli Saared pöördunud Rahvusvahelisse Kohtusse Ühendkuningriikide, Pakistani ja India vastu väitega, et nood on rikkunud 1968. a tuumarelvade leviku tõkestamise lepingu artiklist 6 tulenevat kohustust pidada heas usus läbirääkimisi efektiivsete abinõude üle tuumarelvastumise võidujooksu lõpetamiseks ja täieliku tuumadesarmeerimise lepingu üle. Vastavat lepingut pole tänaseni sõlmitud.

Magistritöö eesmärgist lähtuvalt on autor läbi töötanud ja analüüsinud nii rahvusvahelist kui siseriiklikku õigust ja kohtupraktikat ning inglisekeelset akadeemilist kirjandust, et jaotatuna kolme peatükki anda süsteemne ülevaade rahvusvahelise õiguse hetkeseisust lepingueelsete läbirääkimiste heauskse pidamise kohustuse ning selle rikkumise tagajärgede osas.

Töö esimeses peatükis analüüsib ning tõlgendab autor ÜRO harta ning Rahvusvaheliste lepingute Viini õiguse konventsiooni (edaspidi Viini lepinguõiguse konventsioon) sätteid, milles hea usu põhimõtte avaldub, ning uurib, kuidas on läbirääkimiste heauskse pidamise kohustust sisustatud rahvusvaheliste kohtute praktikas. Autor annab hinnangu lepingueelsete läbirääkimiste heauskse pidamise kohustuse võimalikule tavaõiguslikule staatusale,

analüüsides riikide praktikat ning õigusveenet, sh ÜRO Resolutsiooni 53/101 „Printsiibid ja juhised rahvusvahelisteks läbirääkimisteks“ juba kinnistunud rahvusvahelise õiguse üldpõhimõtete ning rahvusvaheliste kohtute praktika valguses. Kinnitust leiavad hüpoteesid, et rahvusvahelises lepinguõiguses on läbirääkimiste heauskse pidamise kohustust reguleeritud piiratud ulatuses, et lepingueelsete läbirääkimiste heauskse pidamise kohustus on kujunenud rahvusvahelise tavaõiguse normiks ning et kohustus laieneb kõigile riikidevahelistele läbirääkimistele.

Töö teises peatükis analüüsib autor võrdlevat meetodit kasutades, kas hea usu põhimõte on riikide poolt tunnustatud õiguse üldpõhimõttena. Rahvusvahelise Kohtu statuudi artikkel 38 lg 1 punkti c kohaselt ei ole selleks, et mingit põhimõtet saaks rahvusvahelises õiguses tunnustada õiguse üldpõhimõttena, nõutav selle põhimõtte tunnustatus kõigis siseriiklikes õigussüsteemides. Seetõttu ei ole käesoleva töö võrdleva analüüsi puhul tegu kõikehõlmava analüüsiga, vaid tsiviilõiguse (*civil law*) ja üldise õiguse (*common law*) õigustraditsioone esindavate riikide siseriiklike õigussüsteemide võrdlusega. Võrreldavad riigid on valitud K. Zweigerti ja H. Kötzi õigusperekondade jaotuse järgi ning hõlmavad tsiviilõiguse õigustraditsioonis Saksamaa, Prantsusmaa ja Hollandi ning üldise õiguse õigustraditsioonis Inglismaa, USA, Austraalia ja Kanada.

Võrdlus piirdub tavapäraselt lepinguvälise vastutuse küsimusi reguleeriva eraõiguse analüüsiga, eelkõige lepinguõiguse ja deliktiõigusega. Võrdleva analüüsi raskuskese on üldise õiguse õigustraditsioonil, sest küsimus on seal vastuolulisem. Töös toetutakse pretsedendiõigusel põhineva üldise õiguse käsitluse osas ulatuslikult sekundaarkirjandusele, kuna magistritöö autoril on vaid vähene isiklik kokkupuude üldise õigusega. Lisaks toetub autor sekundaarkirjandusele ka Saksamaa, Prantsusmaa ja Hollandi kohtupraktika osas. Kinnitust leiab hüpotees, et lepingueelsete läbirääkimiste heauskse pidamise kohustus ei ole siseriiklikes õigussüsteemides üldtunnustatud.

Töö kolmandas peatükis annab autor ülevaate lepingueelsete läbirääkimiste heauskse pidamise kohustuse rikkumise tagajärgedest nii Viini lepinguõiguse konventsiooni kui ka rahvusvahelise riigivastutuse õiguse alusel. Tagajärgi näitlikustatakse rakendades asjakohaseid norme tuumarelvade leviku tõkestamise lepingust tuleneva läbirääkimiskohustuse võimalikule rikkumisele. Kinnitust leiab hüpotees, et lepingueelsete läbirääkimiste heauskse pidamise kohustuse rikkumisele kohalduvad õiguslikud tagajärjed.

Seega kinnitavad analüüsi tulemused magistritöö põhihüpoteesi, et rahvusvahelises õiguses on riikidel kohustus lepingueelseid läbirääkimisi heas usus pidada ning et selle rikkumisele on kohaldatavad õiguslikud tagajärjed. Järgnevalt antakse täpsem ülevaade töö järeldustest.

Autor väidab, et rahvusvahelises lepinguõiguses on lepingueelsete läbirääkimiste kohustust reguleeritud vaid piiratud ulatuses. Kaks peamist lepingute sõlmimist reguleerivat allikat – ÜRO harta ja Viini lepinguõiguse konventsioon – ei sisalda sõnaselget kohustust lepingueelseid läbirääkimisi heas usus pidada. Kui vastav kohustus tuleneb sõnaselgelt riikidevahelisest lepingust või on vältimatu rahvusvahelise õiguse valdkonna eripärast tulenevalt, tuleb lepingueelseid läbirääkimisi pidada ÜRO harta artikli 2 lõike 2 ja Viini lepinguõiguse konventsiooni artikli 26 kohaselt heas usus. Samuti laieneb hea usu põhimõte vaidluste rahumeelsele lahendamisele läbirääkimiste teel.

Kokkuvõtlikult on Rahvusvaheline Kohus kirjeldanud läbirääkimiste heauskse pidamise sisu nii läbirääkimiste kohustuse täitmise kui ka vaidluste lahendamise kontekstis *Interim Accord* kohtuasjas. Nimelt on riikidel kohustus läbirääkimistesse asuda ning neid pidada lepingu sõlmimise eesmärgiga, kuid üldjuhul ei kaasne sellega kohustust lepingut sõlmida. Riikidel on kohustus mõistlikult arvestada üksteise huvidega ning pidada tähendusrikkaid läbirääkimisi, mh olla valmis kompromissideks ning mitte takistada läbirääkimisi.

Viini lepinguõiguse konventsioon keelustab läbirääkimiste pidamisel pettuse, korruptsiooni, sunni ning õigusvastase relvastatud jõuga ähvardamise või selle kasutamise (artiklid 49-52). Pettuse ja korruptsiooni keeldu käsitletakse kui siseriiklikes õigussüsteemides tunnustatud õiguse üldpõhimõtteid. Sunni ja jõu kasutamise keeld omavad aga rahvusvahelist tavaõiguslikku staatust. Riikide kohustus hoiduda lepingu mõtte ja eesmärgiga vastuolus olevatest toimingutest kuni lepingu jõustumiseni (artikkel 18) ei laiene lepingueelsetele läbirääkimistele. Kuigi vastavad ideed käisid Rahvusvahelise Õiguse Komisjoni ettevalmistavates töödes läbi, ei leidnud need riikide poolehoidu, sest vajaka oli vastavat normi toetavast riikide praktikast. Kohustust ei ole võimalik laiendada läbirääkimistele ka tõlgendamise teel, sest see oleks vastuolus sätte sõnastuse ning riikide tahtega.

Autori hinnangul on nimetatud kohustus siiski kujunenud rahvusvahelise tavaõiguse normiks. Nii sätestab ÜRO Peaassamblee 1999. a resolutsioon 53/101 „Printsiibid ja juhised rahvusvahelisteks läbirääkimisteks“, et riigid peavad lepingueelseid läbirääkimisi pidama heas usus, püüdma säilitada konstruktiivset õhkkonda ning hoiduma tegevusest, mis võib kahjustada läbirääkimisi ja nende edu. Kuigi ÜRO Peaassamblee resolutsioonid ei ole õiguslikult siduvad, annavad selle vastuvõtmise asjaolud alust pidada selles sisalduvaid

printsiipe siduvaks tavaõiguse alusel. Eelnimetatud resolutsioon võeti vastu hääletuseta ning sellele ei ole tehtud reservatsioone. Resolutsioon rõhutab mitmeid rahvusvahelises õiguses kinnistunud printsiipe, mis omavad tähtsust läbirääkimiste puhul, nagu näiteks riikide suverääanne võrdsus, *(p)acta sunt servanda*, jõuga ähvardamise ja jõu kasutamise keeld, kohustus teha koostööd rahvusvahelistes suhetes, vaidluste rahumeelse lahendamise kohustus jm., ning sisaldab läbirääkimistele kohalduvaid nõudeid, mida on järjepidevalt rõhutatud ja rakendatud ka rahvusvaheliste kohtute praktikas. Seega on lepingueelsete läbirääkimiste heauskse pidamise kohustus kujunenud rahvusvaheliseks tavaõiguslikuks standardiks.

Autori arvates ei ole aga käesoleval hetkel võimalik siseriiklikest õigussüsteemidest tuletada lepingueelsete läbirääkimiste heauskse pidamise kohustust kui õiguse üldpõhimõtet, mida tunnustavad tsiviliseeritud rahvad. Kuigi UNIDROIT Rahvusvaheliste kaubanduslepingute printsiibid (PICC), Euroopa lepinguõiguse printsiibid (PECL) ja ühtse tugiraamistiku kavand (DCFR) sisaldavad sätteid lepingueelsete läbirääkimiste heauskse pidamise kohustuse kohta, puudub näiteks ÜRO konventsioonis kaupade rahvusvahelise ostu-müügi lepingute kohta (CISG) vastav säte. CISG-i ettevalmistavad materjalid annavad aimu põhimõttelistest eriarvamustest hea usu põhimõtte tunnustamise osas tsiviilõiguse ja üldise õiguse õigustraditsioonides.

Võrdleva analüüsi tulemusena järeldab magistritöö autor, et erinevalt tsiviilõiguse õigustraditsioonist ei ole üldise õiguse õigustraditsioonis lepingueelsete läbirääkimiste heauskse pidamise kohustus üldtunnustatud. Tsiviilõiguse õigustraditsioonis on levinud lepingueelse vastutuse doktriini – *culpa in contrahendo* – tunnustamine kas kohtupraktikas hea usu üldpõhimõttele tuginemise kaudu või lausa sõnaselgelt seaduses. Sarnaselt rahvusvahelisele õigusele ei ole läbirääkivate pooltel kohustust jõuda kokkuleppele, kuid nad peavad läbirääkimistesse asuma ning neid pidama siira sooviga saavutada kokkulepe. Pooltel on kohustus arvestada teise poole huvidega ning mitte pahauskselt läbirääkimisi katkestada. Lisaks lasuvad läbirääkivate pooltel ulatuslikud täpse ja õige olulise informatsiooni avaldamise kohustused. Lepingueelsetel läbirääkimistel pahauskselt käitunud pool on kohustatud kompenseerima teisele poolele tekkinud usalduskahju.

Traditsiooniliselt on pretsedendil põhinevale Inglise õigusele, mis on oluliselt mõjutanud ka teisi üldise õiguse õigussüsteeme, olnud vastumeelt üldise hea usu põhimõtte tunnustamine. Ebaõigluse vältimiseks rakendatakse kohtupraktikas tükiti välja kujunenud konstruktsioone, sh lepingu tõlgendamist ning tuletatud tingimuste doktriini. Kohustuse heauskse täitmise nõue laieneb reeglina vaid teatud ülima hea usu (*uberrimae fidei*) lepingutele või juhul, kui hea usu

kohustus tuleneb eriseadusest, nt tarbijakaitseõiguse puhul. Sellistele suhetele on omane pooltevaheline ebavõrdsus, mistõttu ei ole selles osas põhimõtte ülekantav rahvusvahelisse õigusesse, kus tunnustatakse kõikide suveräänsete riikide võrdsust hoolimata tegelikult valitsevatest jõuvahekordadest.

Siiski on Inglise õigus liikumas üldise heauskse täitmise kohustuse tunnustamise suunas, taunides lepinguliste õiguste kuritarvitamist ning jõustades lepinguga sõnaselgelt võetud hea usu kohustusi. Ka Austraalias on kohtud vastavaid lepingusätteid jõustanud ning püüdnud hea usu põhimõtet lepingutele laiendada isegi kui õigusest tulenevat kohustust, kuid Austraalia ülemkohus pole veel seisukohta võtnud. Erinevalt Inglise õigusest on USA õiguses Saksa õiguse mõjul lepingute heauskse täitmise kohustus tunnustatud Ühtses Kaubanduskoodeksis. Kanada ülemkohus on hiljuti lahendis *Bhasin v Hrynew* tunnustanud hea usu põhimõtet kui lepinguõiguse üldpõhimõtet, mis kõigi lepingute puhul tähendab minimaalselt aususkohustust.

Üldise õiguse õigustraditsioonis ei ole lepingueelsete läbirääkimiste heauskse pidamise kohustus üldtunnustatud. See oleks vastuolus lepinguvabaduse põhimõtte ning vastutasu ja kindluse kui üldise õiguse oluliste lepingu jõustatavuse tingimustega. Kuulsas *Walford v Miles* kohtuasjas on peetud kokkuleppeid pidada heas usus läbirääkimisi täitmisele mittepööratavateks nende ebamäärasuse tõttu. Hilisemas üldise õiguse kohtupraktikas on hakatud taolisi kokkuleppeid jõustama, kuid seda reeglina vaid sõnaselge ning täpse lepingulise kohutuse olemasolul ehk vastavalt poolte selgelt väljendatud tahtele. Kokkuleppe puudumisel hea usu põhimõtte lepingueelsetele läbirääkimistele ei laiene.

Tükiti väljakujunenud lahendused ebaõigluse vältimiseks, nagu näiteks alusetu rikastumine ning tuginemine vastutasuta lubadusele (*promissory estoppel*), millest viimane ei ole hagi alusena tunnustatud ei Inglise ega Kanada õiguses, pole kaugeltki nii tõhusad kui *culpa in contrahendo* doktriin. Üldise õiguse õigustraditsioonis on lepingueelsetel läbirääkimistel poolte kohustused reeglina piiratud vaid ebaõigete andmete esitamise keeluga, mis võib olla lepingu tühistamise aluseks. Kahju hüvitamise eelduseks on aga reeglina deliktiõigusliku pettuse tõendamine.

Autor leiab, et rahvusvahelises õiguses on riikidel kohustus kõiki lepingueelsete läbirääkimisi heas usus pidada. Õiguslalases kirjanduses on pikema analüüsita nenditud hea usu üldpõhimõtte kohaldumist rahvusvahelistele suhetele, sh kõigile riikidevahelistele lepingueelsetele läbirääkimistele. Rahvusvaheline Kohus on rõhutanud hea usu põhimõtte kohalduvust vaid olemasolevatele kohustustele, kuid üldjuhul on läbirääkimiste pidamine riigi suveräänne õigus, mitte kohustus. Riigid ei tohi seda õigust kuritarvitada. Isegi kui

läbirääkimisi on alustatud ilma vastava sõnaselge või rahvusvahelise õiguse valdkonna eripärast tuleneva kohustusega, saab riikide käitumisest läbirääkimiste eel tuletada kokkuleppe läbirääkimisteks, millele kohaldub *pacta sunt servanda* põhimõte.

Ülalnimetatud ÜRO Peaassamblee resolutsiooni kohaldamisala ei ole piiratud vaid vaidluste lahendamise kontekstiga, vaid hõlmab ka rahvusvahelise suhtekorralduse ning uute rahvusvaheliste käitumisnormide loomise. Ka rahvusvaheliste kohtute praktikas on tunnustatud hea usu põhimõtte olulisust läbirääkimiste kontekstis üleüldiselt. Ebamõistlik oleks hea usu põhimõtte kohaldumiseks nõuda, et riikide vahel oleks läbirääkimiste käigus tekkinud konflikt või vaidlus. Lepingueelsete läbirääkimiste heauskse pidamise kohustuse laienemine kõigile riikidevahelistele läbirääkimistele on oluline rahvusvaheliste suhete stabiilsuse ning rahu tagamiseks.

Lepingueelsete läbirääkimiste heauskse pidamise kohustuse rikkumisega kaasnevad õiguslikud tagajärjed. Kui tegu on lepingulise kohustusega võib läbirääkimistesse mitteasumise või nende pahauskse pidamise korral äärmisel juhul tegu olla lepingu olulise rikkumisega, mis annab aluse Viini lepinguõiguse konventsiooni alusel lepingu täitmise peatamiseks või lepingu lõpetamiseks. Pettuse, korruptsiooni, sunni ning jõuga ähvardamise või jõu kasutamise tulemusena sõlmitud lepingu saab Viini lepinguõiguse konventsiooni alusel tühistada. Lisaks või alternatiivselt juhul, kui läbirääkimised on ebaõnnestunud ja lepingut pole sõlmitud, on rahvusvahelise riigivastutuse õiguse alusel võimalik nõuda kohustuse täitmist, rikkumise lõpetamist ja tagatise rikkumise mittekordamiseks ning reparatsiooni, sh restitutsiooni ehk rikkumisele eelneva olukorra taastamist, kompensatsiooni ehk rahalist hüvitist ning satisfikatsiooni ehk rikkumise tunnistamist ning vabandust. Lisaks võib kannatanuriigil olla õigus võtta vastumeetmeid sundimaks rikkuvat riiki oma kohustuste täitmisele.

Lepingueelsete läbirääkimiste heauskse pidamise kohustuse rikkumise tagajärgi on magistritöös ilmetatud tuumarelvade leviku tõkestamise lepingu artikli 6 võimaliku rikkumise näitel. See kohustab osalisriike läbi rääkima, mh tuumadesarmeerimise lepingu üle. Marshalli Saared on pöördunud Rahvusvahelisse Kohtusse Ühendkuningriigi, India ning Pakistani vastu, väites, et nood on rikkunud läbirääkimiste heauskse pidamise kohustust. Rahvusvaheline Kohus on varasemalt oma *Nuclear Weapons* nõuandvas arvamuses käsitlenud tuumarelvade leviku tõkestamise artiklit 6 mitte pelgalt läbirääkimiste pidamise kohustusena, vaid kokkuleppe saavutamise kohustusena. Kuna tuumadesarmeerimise lepingut ei ole sõlmitud, siis on tegu rikkumisega. Läbirääkimiste heauskse pidamise kohustust on



rikutud ka seetõttu, et tuumarelvi katsetades ja arendades on käitunud vastuolus soovitud lepingu eesmärgiga. Samuti on kohustusega vastuolus lepingueelsetesse läbirääkimistesse mitteasumine ning nende takistamine, hääletades oluliste teemakohaste ÜRO Peaassamblee resolutsioonide vastu. Kohustuse rikkumine toob kaasa ülalkirjeldatud õiguslikud tagajärjed. Kuna Rahvusvahelise Kohtu kohtualluvus on pigem erand kui reegel, siis võib rikkuva riigi vastutuselevõtmine olla keeruline ning näitab rahvusvahelise õiguse mõningast ebaefektiivust. Sellest hoolimata on lepingueelsete läbirääkimiste heauskse pidamise kohustusel oluline roll rikkumiste ärahoidmisel ning rahvusvaheliste suhete stabiilsuse tagamisel.

## LIST OF ABBREVIATIONS

A – Atlantic Reporter  
AC – Appeal Cases  
All ER – All England Law Reports  
ALR – Australian Law Reports  
App Cas – Law Reports Appeal Cases  
ARSIWA – Articles on the Responsibility of States  
BCLR – British Columbia Law Reports  
BCSC – Supreme Court of British Columbia  
BGB – *Bürgerliches Gesetzbuch*  
BW - *Burgerlijk Wetboek*  
CA – Court of Appeal  
Cal App – California Appellate Courts  
Ch – Chancery Division  
Cir – Circuit  
CISG – United Nations Convention on Contracts for the International Sale of Goods  
Civ – Civil Division  
Comm – Commercial Court  
Comp – compiler  
Ct App – Connecticut Appellate Court  
CTBT – Comprehensive Nuclear-Test-Ban Treaty  
DC – District of Columbia  
DCFR – Draft Common Frame of Reference  
Del – Delaware  
Doc – document  
Ed – edition or editor  
ED Va – Eastern District Court of Virginia  
Eds – editors  
ER – The English Reports  
EU – European Union  
EWCA – England and Wales Court of Appeal  
EWHC – England and Wales High Court  
F – Federal Reporter  
F Supp – Federal Supplement

FCA – Federal Court of Australia  
HCA – High Court of Australia  
HL – House of Lords  
HR – *Hoge Raad*  
ICJ – International Court of Justice  
ILC – International Law Commission  
ILM – International Legal Materials  
ILR – International Law Reports  
J – Justice  
KB – King’s Bench  
LJ – Lord Justice  
LR – Law Reports  
Mont – Montana  
NCBC – North Carolina Business Court  
NJ – *Nederlandse Jurisprudentie*  
NPT – Treaty on the Non-proliferation of Nuclear Weapons  
NSWCA – New South Wales Court of Appeal  
NSWLR – New South Wales Law Reports  
NSWSC – New South Wales Supreme Court  
NY – New York  
OEWG – Open Ended Working Group  
ONCA – Court of Appeal for Ontario  
ONSC – Ontario Superior Court of Justice  
PCA – Permanent Court of Arbitration  
PCIJ – Permanent Court of International Justice  
PECL – Principles of European Contract Law  
PICC – Principles of International Commercial Contracts  
QB – Queen’s Bench  
QSC – Supreme Court of Queensland  
Res – resolution  
RIAA – Reports of International Arbitral Awards  
SCC – Supreme Court of Canada  
SCR – Supreme Court Reports  
SDNY – Southern District Court of New York  
SR – Special Rapporteur

UCC – Uniform Commercial Code  
UCL – Uniform Contract Law  
UK – United Kingdom  
UKHL – UK House of Lords  
UKSC – Supreme Court of the United Kingdom  
UN – United Nations  
UNCLOS – United Nations Convention on the Law of the Sea  
UNCLOT – United Nations Conference on the Law of Treaties  
UNGA – United Nations General Assembly  
UNIDROIT – International Institute for the Unification of Private Law  
US – United States  
VCLT – Vienna Convention on the Law of Treaties  
Vol – volume  
VSC – Supreme Court of Victoria  
VSCA – Victorian Supreme Court of Appeal  
WASCA – Supreme Court of Western Australia  
Wash App – Washington Court of Appeals  
Wis 2d – Supreme Court of Wisconsin  
WLR – Weekly Law Reports  
Wn App – Wisconsin Court of Appeals

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